

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
APPENDIX**

PAGINATION AS IN ORIGINAL COPY

76-7102

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

-----X
JOSEPHINE McGRAW, individually and on :
behalf of her minor dependent children :
and all persons similarly situated, :

Plaintiff-Appellant, :

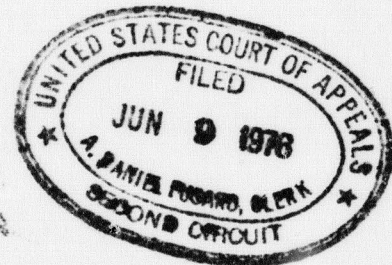
-against- :

STEPHEN BERGER, individually and as Com- :
missioner of the New York State Department :
of Social Services, :

JAMES DEMPSON, individually and as Com- :
missioner of the New York City Department :
of Social Services, and :

THE NEW YORK STATE DEPARTMENT OF :
SOCIAL SERVICES, :

Defendants-Appellees. :
-----X



PORTIONS OF THE RECORD CITED
IN STATE DEFENDANTS-APPELLEES'
BRIEF

LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
Attorney for Defendants-Appellees
Berger and The New York State
Department of Social Services
Office & P.O. Address
Two World Trade Center
New York, New York 10047
Tel. No. 488-7400

JUDITH A. GORDON
Assistant Attorney General
of Counsel

PORTIONS OF THE RECORD CITED
IN STATE DEFENDANTS-APPELLEES'
BRIEF*

TABLE OF CONTENTS

	<u>Page</u>
Supplemental Affidavit of Paul Katz, sworn to November 5, 1975, read in support of defendants' Motion For Summary Judgment.	1
Plaintiff's Family Budget Computation Form, Exhibit "A" to Katz' Supplemental Affidavit.	4
State Defendants' Answers to Plain- tiff's Interrogatories.	6

* Circuit Judge William H. Timbers granted plaintiff-appellant ("plaintiff") leave to dispense with the filing of an appendix on condition that she file four (4) copies of the portions of the record upon which she relies on appeal. Order of the Hon. William H. Timbers, dated March 25, 1976. Pursuant to that order, plaintiff has filed a document entitled "Portions of the Record Cited in Plaintiff-Appellant's Brief" (abbreviated as "R"). The document does not include any of defendants-appellees' papers below except a three [3] page excerpt from one of the State defendants' memoranda. Accordingly, the State defendants-appellees submit herewith "Portions of the Record Cited in the State Defendants-Appellees' Brief" (abbreviated as "S.R.") incorporating the portions of the record upon which they rely on this appeal.

	<u>Page</u>
ADC Overpayments, Summary and Error Analysis, Exhibit "G" to State Defendants' Memorandum of Law.	9
HEW Approval of 18 NYCRR § 352.31(d) as promulgated on June 2, 1970, Exhibit "B" to State Defendants' Memorandum of Law.	11
HEW Approval of 18 NYCRR § 352.31(d) as promulgated on May 30, 1974, Exhibit "C" to State Defendants' Memorandum of Law.	12
HEW Approval of 18 NYCRR § 352.31(d) as promulgated on December 1, 1974, Exhibit "D" to State Defendants' Memorandum of Law.	13
NYSDSS Administrative Letter No. 74 ADM-11B, dated August 8, 1974, Exhibit "E" to State Defen- dants' Memorandum of Law.	14
NYSDSS Administrative Letter No. 75 ADM-46, dated May 20, 1975, Exhibit "F" to State Defen- dants' Memorandum of Law.	18
Memorandum for the United States as <u>Amicus Curiae</u> in <u>Johnson v.</u> <u>Likens</u> , No. 4-75 Civ. 318.	19
Appendix A to United States Memorandum.	35
Appendix B to United States Memorandum.	37

	<u>Page</u>
<u>Steere v. State of Minnesota,</u> <u>Minnesota Supreme Court,</u> No. 285 (1975), decided May 21, 1976.....	40
^{<i>Berg</i>} <u>Hagans v. Van Buren,</u> 2d Circuit, Docket No. 76-7101, decided June 2, 1976.....	65

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X
JOSEPHINE McCRAW, et al., :
Plaintiffs, :
-against- : SUPPLEMENTAL AFFIDAVIT
STEPHEN LERGER, et al., : 75 Civ. 4632 (SDC)
Defendants. :
-----X

STATE OF NEW YORK)
: SS.:
COUNTY OF NEW YORK)

PAUL KATZ, being duly sworn, deposes and says:

I am employed by the New York City Human Resources Administration as a Supervisor I assigned to the Liaison and Adjustment Section at the Amsterdam Income Maintenance Center. In that capacity, I serve as a liaison between the center and public agencies, hospitals, the community, etc. I obtain information for clients, respond to requests for information, and help to resolve client fair hearing problems.

I make this Supplemental Affidavit on the basis of an examination of plaintiff's file, to explain plaintiff's present AFDC budget. A copy of the Family Budget Computation Form used to derive her budget is annexed hereto as Exhibit "A".

Mrs. McCraw's budget, over the years, has reflected many errors, caused both by agency error and a failure on her part to supply correct information.

In January, 1975, a computational error was discovered in her budget which had resulted in a \$699.36 overpayment. A discussion of this overpayment is contained in my Affidavit of October 27, 1975.

After a fair hearing, it was also discovered that she had incorrectly been credited as receiving support money from her husband during a period when the Court order under which he had been paying such money had been suspended.

Further, her pay stubs revealed that she had had a \$20 per week salary decrease.

In June, 1975, she received a \$264 rent advancement, and in September, 1975, she received an additional \$364 for this purpose.

The annexed budget, on which she currently is receiving her semi-monthly AFDC grant of \$191.24, reflects all of these developments.

Her family allowance of \$284.00 (S B, Needs, Line 1) is based on the state-wide standard of need for a family of her size. Her shelter allowance of \$59.00 (S B, Needs, Line 2) reflects her rent needs. The sum of \$343 is therefore her total computed household needs (S B, "TOTAL NEEDS").

Her gross semi-monthly earnings, computed from the latest pay stubs available, is \$265.84 (S C, Line 1).

The amount of the disregarded income is \$98.61 (S C, Line 2).

Her work-related deductions from gross earnings total \$49.77 (S C, Line 3).

Her net earned income for computational purposes is comprised of her gross earnings, minus the disregarded income and work expenses. It amounts to \$117.46 (S C, Line 5; S B, Income, Line 1).

Note, however, that her actual take-home pay consists, not of \$117.46 but of \$216.07 (\$265.34 in gross income minus \$49.77 in actual work related expenses).

Pursuant to regulations governing recoupment for rent advances, 10% of her household needs, or \$34.30, is deducted (\$ 3, Income, Line 3). I would like to note that, under applicable regulations, 15% of her needs could have been so recouped, but, apparently after consideration of her situation, the agency decided to recoup only this amount.

This \$34.30, as of September 11, 1975, was for both the two rent advancements and the overpayment in question. As of Judge Connors' order suspending recoupment for this overpayment, the \$34.30 has been applied solely to effect recoupment of the rent advances.

Her AFDC grant of \$191.24 (\$ B, Budget Deficit) is arrived at as follows: from her total needs of \$343.00, both her net earned income (\$117.46) and the amount of the recoupments (\$34.30) are subtracted, leaving a sum of \$191.24.

This means that, in fact, Mrs. McGraw has a semi-monthly sum of \$407.31 to use for her daily expenses -- \$191.24 in AFDC, and \$216.07 actual take-home pay.

If she did not work, her AFDC grant would equal her total needs, or \$343.00, minus a possible recoupment for the rent advances, depending on the agency's determination -- required under applicable regulations -- of whether recoupment would cause undue hardship.

Paul Katz
PAUL KATZ

Sworn to before me this
5th day of November, 1975

Rosalind Lane
Rosalind Lane
Assistant Attorney General
C. M. Smith, Jr. District Clerk

(IM Specialist prepares two copies on cases with income from employment, training, lodger(s) or boarding lodger(s); in all other cases, prepares single copy)

I.M. CENTER

Basic Case Name

Basic Case No. (Cat./No. /Suffix)

Address

McGraw Josephine

ADC 2055933-1

201 W. 93 St.

Other Eligible Payee	Name	Category /Suffix	Name	Category /Suffix

SECTION A. TOTAL NUMBER OF PERSONS IN HOUSEHOLD RECEIVING PUBLIC ASSISTANCE 10

FSI

SECTION B. ESTIMATED NEEDS AND INCOME

9/11/75

NEEDS	AMOUNTS TO BE PROPORTIONED	SEMI-MONTHLY AMOUNTS							
		Cat.	No. of Pers.	Cat.	No. of Pers.	Cat.	No. of Pers.	Cat.	No. of Pers.
		ADC	10						
1. Family Allowance	284.00								
2. Shelter	59.00								
3. Fuel for Heating									
4. Other (specify)									
TOTAL NEEDS	343.00								
INCOME									
1. Net Earned Income (from Sec. C)	117.46								
2. Net Boarding-Lodger Income (from Sec. C)	Rent Duplication								
3. Other Income (from Sec. D)	FS2 Overpayment \$34.30								
TOTAL INCOME	151.76								
BUDGET	Deficit								
	Surplus								
	191.24								

J. Raker

004

9/11/75

ROUTING: On cases requiring two copies, original filed in IM record; copy forwarded with Form W-129E to Food Stamp Program 200 Church Street.
In all other cases, single copy filed in IM record.

- 4 -
Exhibit "A" to Katz
Supplemental Affidavit

BEST COPY AVAILABLE

SECTION C. INCOME FROM EMPLOYMENT, TRAINING OR BOARDING LODGER; APPLICABLE EXEMPTIONS AND EXPENSES.

SECTION D. OTHER INCOME

Name of Earner	FOR FOOD STAMP PROGRAM ONLY				TYPE OF INCOME	GROSS INCOME	EXPENSES	NET INCOME
Gross S/M Earnings FS5	265.84				1. Lodger			
Permissible Exemption (See Chart in Section II of Handbook)	15.00 8361				2. Business			
Expenses					3. Workmen's Compensation			
a. Transportation	10.83				4. State Disability			
b. Lunch	10.83				5. U.I.B.			
c. Child Care					6. Property			
d. Federal Income Tax					7. Social Security Benefits			
e. State Income Tax	2.38				8. Veterans' Pension or Compensation			
f. City Income Tax	1.08				9. Other (specify)			
g. Social Security	15.54				TOTAL			
h. N.Y.S. Disability	.65				SECTION E. FOOD STAMP INFORMATION			
i. Union Dues	3.32				1. Actual S/M Rent FS7			
j. Pension	5.24				2. S/M Educational Costs			
k. Other (specify)					3. Court-ordered Support/Alimony			
Total Deductions (2+3)	148.38				4. Health Care Payments (if over \$5 S/M)			
Net Applicable Earned Income (1-4)	117.46				5. Total Deductions (2+3+4) FS8			
Net Income from boarding - Lodger *					6. a. Total Income from Boarding-Lodger #1			
					b. Total Income from Boarding-Lodger #2			
					7. Total S/M Income from Boarding-Lodger(s) FS9			
					8. Number of Boarding Lodger(s) FS10			
					9. Is Client Self-employed? FS11	<input type="checkbox"/> Yes	<input type="checkbox"/> No	

Enter in Item 2 under Income in Section B on face.

FS12 - Punch PA - Compute

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

JOSEPHINE MOGRAW, individually and on behalf of her
minor dependent children and all persons similarly
situated,

Plaintiffs,

- against -

STEPHEN BERGER, individually and as Commissioner
of the New York State Department of Social Services,

JAMES DUMPSON, individually and as Commissioner
of the New York City Department of Social Services,
and

THE NEW YORK STATE DEPARTMENT OF SOCIAL SERVICES,

Defendants.

:
:
:
: ANSWERS TO
INTERROGATORIES

: No: 75 Civ. 4682

: (W.C.)
:
:
:
:
:
:
:
:
:
:

John Hickey, Associate Social Services Planning Specialist, Division
of Income Maintenance, New York State Department of Social Services, answers
as follows to plaintiff's first interrogatories.

1. In answer to interrogatory "1", the estimated number of working
AFDC recipients in New York State whose "available income" is computed in
accordance with the disregard procedures of 42 USC §602(a)(8) = $\frac{29,400}{28,000}$
Mothers = $\frac{28,000}{1,400}$
Dependent children = 1,400

The above estimate was derived from employment data contained in the 1973
AFDC Characteristic Study reduced to reflect higher unemployment rates currently
extant. The total caseload used was 350,000 cases, since that was the number
of active cases from which the Quality Control sample was drawn.

2. In answer to interrogatory "2", based on the results of an AFDC
Quality Control Sample for the six-month period, January 1 - June 30, 1975,
it is estimated that 25.8% of the cases involved an overpayment. The sample
consisted of 1,211 cases drawn from a universe of 350,000 active cases. There

There were 313 cases with an overpayment greater than \$5.00. The average case consists of 3.1 persons. Projecting the sample findings to the total caseload, there would be 80,300 overpaid cases involving approximately 280,000 persons.

3. In answer to interrogatory "3", based on the sample referred to in #2, the overpayment errors attributable to the agency during this period were 42%.

4. In answer to interrogatory "4", based on the sample referred to in #2, the errors attributable to the recipients were 58% during this period. In cases involving client error 41.7% were deemed to be due to misrepresentation or withholding of information (fraud). The standard applied to distinguish recipient caused errors which are willful from those which are deemed not to be willful can be found in Social Services Law section 145 and Bulletin 169, 73 MB-3, January 12, 1973. (copy annexed).

5. In answer to interrogatory "5", a new budget is computed for the recipient. The new budget would include the extra income, any related expense incidental to employment (18 NYCRR 352.19) and the applicable earned income disregard (18 NYCRR 352.20). Bulletin 134 is the administrative directive, however, it is a restatement of Department Regulations.

6. The Department of Social Services is unable to answer interrogatories "6" and "8". No information is currently available regarding the number of overpayment recoupments by grant reduction or the number of recoupments from earnings disregards.

7. In answer to interrogatory "7", based on the sample referred to in #2, 10.7% of the cases sampled had earned income budgeted. Applying the 3.1 persons per case average, the total number of persons in the cases budgeted with earned income would equal 4,000. Projecting these sample findings to the total caseload would produce 37,450 cases with earned income involving 116,095 persons.

John Hicke

JOHN HICKE.
Associate Social Services Planning
Specialist

Sworn to before me this
17 day of October, 1975

Glenn R. Lefebvre

Notary Public

Albany County, # 4608937

Commission expires 3/30/77

[Bulletin 169, 73 MB-3 omitted.]

ADC OVERPAYMENTS

AGENCY ERRORS

Summary

- Agency errors - 43.1% of overpayments.
 - 4.3% of ADC expenditures
 - Dollar impact - \$28.8 million

Failure to Take Indicated Action

- 72.1% of agency errors attributable to failure to take action on available information.
 - Work program requirements
 - Available income
 - Shelter costs

Policy Incorrectly Applied

- 19.5% related to incorrect application of policy.
 - Misinterpretation of State and Federal regulations regarding WIN requirements
 - Shelter costs

Computation or Transcription Errors

- 8.4% of agency error due to incorrect computation or transcription of budget information.

EXHIBIT G

OVERPAYMENTS - AGENCY ERRORS

ERROR ANALYSIS

- Reported Income Not Budgeted or Budgeted Incorrectly - 34.4%
 - Increased earnings
 - Voluntary support payments
 - SSI benefits
- Incorrect Compilation of Client's Budget - 27.9%
 - Proration of rent for non-PA member of household
 - Non-related "friend" in household
 - Child no longer eligible for inclusion in case Co-op SSI cases
 - Rent in excess of agency maximum
 - Allowance for fuel in "heated apartment"
- Failure to Register Appropriate Recipients for Work Incentive Program (WIN) - 26.0%
 - One or more member of case not screened
 - Head of household employed to less than full capacity
 - Children over 16-18, no longer attending school
 - Unemployed head of household
- Dependent Child not eligible - 5.2%
 - Child 16 years old or older no longer attending school
 - Dependent child over 21 years of age
 - Lack of documentation supporting family relationship
- Incorrect assessment of deprivation factor - 3.9%
 - Incapacity terminated
 - Continued absence invalid
- Arithmetic Computation - 2.6%

JUL 3

12

TRANSMITTAL AND NOTICE OF APPROVAL OF STATE PLAN MATERIAL
SOCIAL AND REHABILITATION SERVICE STATE PLAN PROGRAMS

TO: REGIONAL COMMISSIONER SOCIAL AND REHABILITATION SERVICE DEPARTMENT OF HEALTH, EDUCATION, & WELFARE		TRANSMITTAL NUMBER 70-15	
I PROGRAM IDENTIFICATION (Same identification as title page of preprinted plan)			
II Federal Agencies			
II TYPE OF ACTION SUBMITTED FOR APPROVAL (Check one and enter effective date)			
<input type="checkbox"/> NEW STATE PLAN <input type="checkbox"/> AMENDMENT		EFFECTIVE DATE JUN 23, 1970	
COMPLETE REMAINDER OF PART II IF THIS IS AN AMENDMENT (Separate transmittal for each amendment)			
FEDERAL REGULATION CITATION			
NUMBER OF THE PLAN SECTION OR ATTACHMENT As indicated		NUMBER OF THE SUPERSEDED PLAN SECTION OR ATTACHMENT As indicated	
SUBJECT OF AMENDMENT Official Compilation Code, Rules and Regulations of the State of New York Supplement -6 -- June 30, 1970			
III GOVERNOR'S REVIEW (Check one)			
<input type="checkbox"/> GOVERNOR'S OFFICE REPORTED NO COMMENT			
<input type="checkbox"/> COMMENTS OF GOVERNOR'S OFFICE ENCLOSED			
<input type="checkbox"/> NO REPLY RECEIVED WITHIN 45 DAYS OF SUBMITTAL TO GOVERNOR'S OFFICE			
SIGNATURE OF STATE AGENCY OFFICIAL		REPORT OF SRS APPROVAL	
TITLE Acting Commissioner		DATE RECEIVED IN REGIONAL OFFICE JUL 2 1970	REGION TH
DATE 11/4/70		Plan approved - one copy attached	
RETURN TO: (Name and Address of State Agency) (State) (City) (Zip) 1400 Fulton Avenue Albany, New York 12203		SIGNATURE OF REGIONAL OFFICIAL Elmer W. Smith (for -)	
		TITLE Regional Commissioner	DATE JUL 2 1970
		REMARKS Approved with exception of Sec. 352.2 + Sec. 352.3, (a) (3) Sec. 352.3	
SRS - OPC - 11 (MAR, 1970)			

Exhibit B

TRANSMITTAL AND NOTICE OF APPROVAL OF STATE PLAN MATERIAL
SOCIAL AND REHABILITATION SERVICE STATE PLAN PROGRAMS

TO: REGIONAL COMMISSIONER SOCIAL AND REHABILITATION SERVICE DEPARTMENT OF HEALTH, EDUCATION, & WELFARE	TRANSMITTAL NUMBER 74-37
--	-----------------------------

I PROGRAM IDENTIFICATION (Some identification as title page of preprinted plan)
All Federal Programs

II TYPE OF ACTION SUBMITTED FOR APPROVAL (Check one and enter effective date)	
<input type="checkbox"/> NEW STATE PLAN	EFFECTIVE DATE
<input checked="" type="checkbox"/> AMENDMENT	May 1974

COMPLETE REMAINDER OF PART III: THIS IS AN AMENDMENT (Separate transmittal for each amendment)
FEDERAL REGULATION CITATION

IV
NUMBER OF THE PLAN SECTION OR ATTACHMENT
Revised Pages - Code Rules and Regulations
Department of Social Services
SUBJECT OF AMENDMENT
As indicated

Codes, Rules, and Regulations, State of New York, Title 18
Supplement No. 5, May 1974

III GOVERNOR'S REVIEW (Check one)

☐ GOVERNOR'S OFFICE REPORTED NO COMMENT

☐ COMMENTS OF GOVERNOR'S OFFICE ENCLOSED

☐ NO REPLY RECEIVED WITHIN 45 DAYS OF SUBMITTAL TO GOVERNOR'S OFFICE

SIGNATURE OF STATE AGENCY OFFICIAL <i>[Signature]</i>	REPORT OF REGIONAL APPROVAL	
TITLE Commissioner	DATE RECEIVED IN REGIONAL OFFICE AUG 23 1974	REGION II
DATE August 21, 1974	Plan approved - end copy attached	
RETURN TO: (Name and address of state agency) NYS Department of Social Services 1450 Western Avenue Albany, New York 12203	SIGNATURE OF REGIONAL OFFICIAL <i>[Signature]</i> (WT)	DATE 8/15/75
	TITLE REGIONAL COMMISSIONER	

REMARKS
APPROVED WITH THE EXCEPTION OF
SECTIONS 352.7(3)(7); 352.31(1)(3)(iv)
& 352.30(D). SEE LETTER DATED
8/15/75

EXHIBIT C

TRANSMITTAL AND NOTICE OF APPROVAL OF STATE PLAN MATERIAL
 SOCIAL AND REHABILITATION SERVICE STATE PLAN PROGRAMS

FEDERAL COMMISSIONER SOCIAL AND REHABILITATION SERVICE DEPARTMENT OF HEALTH, EDUCATION, & WELFARE	TRANSMITTAL NUMBER 75-14
---	-----------------------------

GENERAL IDENTIFICATION (Same identification as title page of prefiled plan)

All Federal Programs

AS AMENDMENT FOR APPROVAL (Check one and enter effective date)

NEW STATE PLAN AMENDMENT	EFFECTIVE DATE	December 1974
-----------------------------	-------------------	---------------

IF REMINDER OF PART II IF THIS IS AN AMENDMENT (See form attached for each amendment)
 AL REGULATION CITATION

IV

END OF PLAN SECTION OR ATTACHMENT

Social Services Dept. Regulations
 Page Replacements

NUMBER OF THE SUPERSEDED PLAN SECTION OR ATTACHMENT

As indicated

END OF AMENDMENT

NY Code of Rules and Regulations - Title 18, Supplement 12, December 1974

GOVERNOR'S REVIEW (Check one)

- ☐ GOVERNOR'S OFFICE REPORTED NO COMMENT
☐ COMMENTS OF GOVERNOR'S OFFICE ENCLOSED
☐ NO REPLY RECEIVED WITHIN 15 DAYS OF SUBMITTAL TO GOVERNOR'S OFFICE

TITLE OF STATE AGENCY OFFICIAL

Commissioner

March 12, 1975

NAME OF (NAME OF AGENCY OR DIVISION)

NYS Department of Social Services
 1450 Western Avenue
 Albany, New York 12243

REPORT OF THE REGIONAL OFFICE

DATE RECEIVED IN REGIONAL OFFICE

MAR 20 1975

REGION

II

Plan approved - one copy attached

SIGNATURE OF REGIONAL OFFICIAL

[Signature] (N.Y.)

TITLE

DATE

REGIONAL COMMISSIONER 9/10/75

REMARKS

WITH THE EXCEPTION OF SECTIONS
 352.30(d) & 354.31(a)(3)(iv). SEE
 LETTER DATED 8/15/75. ALSO
 REPEATED REFERENCES TO AADD
 SHOULD BE DELETED

EXHIBIT D

STATE OF NEW YORK
DEPARTMENT OF SOCIAL SERVICES
1450 WESTERN AVENUE
ALBANY, NEW YORK 12203

Superior Court
Mr. Kappas

ALICE L. INE
COMMISSIONER

ADMINISTRATIVE LETTER

TRANSMITTAL NO.: 74 ADM-118

DATE: August 8, 1974

TO: Commissioners of Social Services

SUBJECT: Recoupment of Overpayments and Correction of Underpayments

DISTRIBUTION: All Public Assistance Staff

Amended Department Regulations relating to recoupment implementing Federal Regulations became effective May 30, 1974. However, a Federal court action (*WRO v. Weinberger*) declared the Federal Regulations invalid and prohibited "recoupment from public assistance grants of prior overpayments when the recipient lacks income or resources available in the amount of the proposed reduction" except in cases where the "overpayments were occasioned or caused by a recipient's willful withholding of information concerning his income and resources ..."

Revised Federal regulations complying with the court order have been promulgated, and the Department Regulations which were effective May 30th are being amended accordingly.

The policy in such cases, as contained in Section 352.31 of the Department Regulations is as follows:

(d) Recoupment of overpayments

(1) Except as provided in Paragraph (2) herein, recoupment of overpayments of assistance including overpayments resulting from assistance paid pending a hearing decision shall be treated as follows:

(i) Recoupment shall be limited to overpayments made during the 12 months preceding the month in which the overpayment was discovered.

Filing Reference

Previous Comm.	Regs.
73-130 (8/14/73)	352.31 (d)
	352.7 (g)(5)
	352.7 (g)(7)
MB reference	
Bull. 134	
Pg. C 12	
Pg. I 6	

EXHIBIT E
-14-

- (ii) Recoupment of any overpayment made to a recipient shall not be required unless the recipient has currently available income or resources, exclusive of the current assistance payment. Exempted income and disregards shall be considered as being currently available.

NOTE: Where the exempted income or disregards which must be utilized as being currently available are greater than the public assistance grant, the grant shall be withheld until the amount of the excess payments have been recouped.

- (2) Where overpayments were occasioned or caused by the recipient's willful withholding of information concerning his income, resources or other circumstances which may have affected the amount of the public assistance payment, recoupment of prior overpayments from current assistance grants shall be made irrespective of current income or resources. In such cases, recoupment shall not be limited to overpayments made during the 12 months preceding the month in which the overpayment was discovered.
- (3) Recoupment under the provisions of paragraph (2) above shall be made only when:
 - (i) recipients are periodically notified in the form required by the Department, and not less frequently than semi-annually, that (a) they must report changes in income, resources and other circumstances which may affect the amount of the public assistance grant to the local social services agency within ten days after each change and (b) they must report unexplained increases of a specified amount in their public assistance payments over their prior payments before cashing their public assistance check. This notification shall indicate the type of information to be disclosed by the recipient and shall include examples of the most frequent types of newly acquired income or resources (e.g., inheritance, wages from part time job).
 - (ii) the recipient has been advised that he is required to contact the social services agency within ten days if there is any doubt whether a particular change in circumstances constitutes reportable information; and
 - (iii) the social services agency has obtained periodic formal acknowledgement by the recipient that the reporting obligations have been brought to his attention and that they were understood.

To accomplish this districts shall have printed on the endorsement side of each public assistance check the following:

I, the undersigned, am aware that I am required to report to the _____ Department of Social Services any income, resources or other circumstances that may affect the amount of public assistance payments to me and my family. Such changes include inheritance, wages from part time job, decrease in family size, etc. If my check appears in error (more than 3.00 greater than my prior check without explanation) I am to notify the social services agency before cashing.

I understand this before cashing.

Signature and endorsement _____

The provisions of this part shall be explained to the client at the time of application and recertification. He shall be further advised of the formal acknowledgement which will appear on his public assistance check and that his signature thereon is to confirm his understanding of the reporting requirements.

- (4) The proportion of the current assistance grant that may be deducted for recoupment purposes shall be limited on a case-by-case basis so as not to cause undue hardship, and in no case shall exceed 10% of the household needs and shall continue until such time as the excess payments have been recovered, except that where two or more recoupments are made simultaneously for different reasons or arising from different circumstances, the total reduction in the assistance grant shall not exceed 15% of the household's need. In the event the amount required to be reduced hereby is greater than the amount of the current grant payments, such payments shall be withheld until the amount of the excess grants has been recouped.
- (5) When a recipient who is subject to recoupment moves from one social services district to another, the new district of residence shall recoup overpayments made by the social services district of original residence in accordance with the provisions of these regulations. The new district of residence shall after deducting its administrative expenses, forward such recoupment to the district which made the overpayment.
- (6) If the overpayment is of a minimal amount (not to exceed \$5.00 per month), and if the social services official determines that the cost of collection would exceed the amount of the overpayment, the social services official may waive recoupment of the overpayment. Appropriate adjustment of the recurring public assistance grant shall be made to prevent continued overpayment.

(e) Correction of underpayments.

- (1) Payments to current recipients to correct underpayments shall be made promptly subject to the following conditions.
 - (i) Retroactive payments shall be made only for the 12 months proceeding the month in which the underpayment is discovered.
 - (ii) Retroactive payments shall not be considered as income or as a resource in the month paid nor in the next following month.
 - (iii) If the underpayment is less than \$5.00, the social services official need not authorize a retroactive corrective payment.

Department Regulations have also been amended regarding rent and utility advances as provided in 18 NYCRR Section 352.7 as follows:

Subsection (5)

For a recipient of public assistance, an advance allowance may be provided upon request to pay for utilities already furnished in the same dwelling in which he resides and for which a grant has been previously issued, to prevent a shut-off or to restore services. Such an allowance shall not exceed the cost of such utilities for the four-month period immediately preceding the advance payment, and may be provided only where the recipient has made a request in writing for such an allowance, and has also requested in writing that his grant be reduced in equal amounts over the next six months to repay the amount of advance allowance.


Subsection (7)

For a recipient of public assistance who is being evicted for non-payment of rent for which a grant has been previously issued, an advance allowance may be provided upon request to prevent eviction or to rehouse the family. Such an allowance may be provided only where the recipient has made a request in writing for such an allowance, and has also requested in writing that his grant be reduced in equal amounts over the next six months to repay the amount of the advance allowance. When there is a rent advance for more than one month, or more than one rent advance in a 12-month period, subsequent grants for rent shall be provided as restricted payments in accordance with part 381 of the Department Regulations.

Federal regulations, as implemented by the foregoing, became effective July 10, 1974. Such Federal regulations require that districts take immediate action to ensure that:

1. any recoupment of overpayments resulting from administrative error made since July 10, 1974 shall be restored.
2. any policy requiring assistance recipients to return checks which are too large because of failure to report an increase in resource or income, or which appear increased over their previous check without explanation, must be accompanied by a policy under which a replacement check is issued within 24 hours.
3. where recoupment has been instituted to recover an overpayment resulting from a willful withholding of information affecting the amount of the public assistance payment, such recoupment shall be revised to conform to the procedure set out in this directive; such grant adjustments are to be made immediately.
4. single individuals whose cases have been closed because of the willful withholding of information affecting their grant or degree of need are notified that they may be eligible for public assistance under the hardship provision and that they should reapply.

If there are questions regarding this release, please communicate with the Division of Income Maintenance, State Department of Social Services.


Deputy Commissioner

AGE LAVINE
COMMISSIONER

STATE OF NEW YORK
DEPARTMENT OF SOCIAL SERVICES
1450 WESTERN AVENUE
ALBANY, NEW YORK 12203

MR. Royce

ADMINISTRATIVE LETTER

TRANSMITTAL NO.: 75 ADM-46

TO: Commissioners of Social Services

DATE: May 20, 1975

SUBJECT: Recoupment of Overpayments

SUGGESTED
DISTRIBUTION: All Public Assistance Staff

The purpose of this letter is to clarify Department policy concerning recoupment as contained in Department Regulation Section 352.31(d) and Administrative Letter 74 ADM-118.

In all cases of overpayment, recoupment shall not exceed 10% of the household needs except 15% of the household needs when two or more recoupments are made at the same time for different reasons. HOUSEHOLD NEEDS ARE THE TOTAL NEEDS OF THE HOUSEHOLD from the Budget Worksheet, DSS-543, Section A - Needs, line - 15.

In cases where the overpayment is not the result of the recipient's willful withholding of information, recoupment shall be made only from exempt income and disregards or available resources. SUCH RECOUPMENT SHALL BE LIMITED TO 10% (or 15%) OF THE HOUSEHOLD'S NEEDS and in no case shall the 10% (15%) be greater than currently available income or resources. Currently available income is only income which is exempted by reason of an income disregard; i.e., 30 1/3 for employed ADC recipients. Income such as monthly OASDI benefits, unemployment insurance benefits, support payments which are totally applied against the needs, are not subject to recoupment.

In cases where the overpayment is the result of the recipient's willful withholding of information, recoupment shall be made from household needs regardless of currently available income or resources. SUCH RECOUPMENT SHALL BE LIMITED TO 10% (or 15%) OF THE HOUSEHOLD NEEDS regardless of whether there is currently available income or resources.

If there are any questions, contact the Division of Income Maintenance.


Deputy Commissioner

FILING REFERENCE
Prev. Comm. Dept. Reg.
73 PWD-130 352.31(d)
74 ADM-118
MB Reference
B. 134, p. C-12
p. I-6

EXHIBIT F
-18-

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION



LINDA D. JOHNSON, et al,

Plaintiffs,

vs.

VERA LIKINS, et al.

Defendants.

Civil Action No. 4-75-Civ. 318

MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

This memorandum is submitted in response to the Court's invitation to the Secretary of the U. S. Department of Health, Education, and Welfare to file an amicus brief expressing the view of the United States on the issues involved in this case. 1/

ISSUE

This Memorandum of the United States will discuss the issue of whether recoupment of overpayments from disregarded income in cases of agency error is permissible under the Social Security Act and the regulations promulgated by the Secretary pursuant thereto.

STATEMENT

For the reasons discussed below, it is the position of the Secretary of Health, Education, and Welfare, that recoupment from disregarded income of overpayments caused by agency error is permissible under the statute and is authorized by HEW regulations at 45 C.F.R. 233.20(a)(12)(i)(a)(1). 2/

1/ Johnson v. Likins, No. 4-75-Civ. 318 (D. Minn., decided October 10, 1975) Memorandum and Order at 38-39 (hereinafter cited as memorandum).

2/ Due to a printing error in 45 C.F.R. 233.20(a)(12), the numbering of the recoupment regulations and the order of part of this regulation as it appears in the Code of Federal Regulations is not correct. Therefore, enclosed as Appendix A is a copy of the regulations as they appeared in the Federal Register which contains the correct numbering scheme and order. Although this memorandum will refer to the Code of Federal Regulations, the numbering cited will conform with the Federal Register.

-2-
At the outset, it is essential to understand that are two completely separate and discrete processes are involved:

(1) the determining of eligibility for assistance and computing the amount of assistance and (ii) the recouping of previous overpayments. Confusion in this area arises because the income disregards play a role in both of these distinct operations. The Court's discussion of the disregard process (memorandum at 34) reveals that the Court has been misled on this subject and thus makes clarification of the process crucial to the ultimate resolution of the issue in this case. 3/

The first step in the process is the determination of eligibility for AFDC. A related operation which occurs at this point is the calculation of the amount of the assistance grant. In determining whether a recipient family is eligible for assistance, the amount of income and resources available

3/ Relying upon HEW regulations (45 C.F.R. §233.20(a)(12)(i) (a)(1) and §233.20(a)(3)(ii) (a), (b), (c), (d)), the Court presumes that recoupment from disregarded income requires a redetermination of need. Thus the Court stated, "[I]f one-half of the disregard income 'were not there,' then... the proper amount of the assistance payment would be \$160." (memorandum at 34). This interpretation of the regulations, although understandable, is at variance with that of the Department which does not view the statute to require a redetermination of need after the assessment of a recoupment for past overpayments against disregarded income. (A more detailed description of the Department's view of the process is provided infra at 2-6.)

The Court's conclusion is premised upon the view that disregarded income is income not exclusive of the current assistance payment. The Department's unfortunate choice of the phrase "exclusive of the current assistance payment" (in 45 C.F.R. 233.20 (a)(12)(i)(a)(1)) contributed greatly to this interpretation, which is one not intended by the regulation. The words "exclusive of the current assistance payment" were designed to meet the objection of the Court in *N.W.R.O. v. Weinberger*, 377 Supp. 861 (D.D.C. 1974) by precluding recoupment from the grant itself (in the absence of willful withholding of information by the recipient) where there was no other income or resources currently available for recoupment. The regulation did not purport to shield disregarded income from recoupment. However, ambiguity resulting from the the regulation soon became apparent. Clearly, the Court was also disturbed by this possibility, and expressed this concern in its "no principled stopping point" analysis (memorandum at 34). Thus, to avoid the possibility that a state might read "exclusive of the current assistance payment" as permitting recoupment from regarded (income used to reduce dollar for dollar the amount of the grant) as well as disregarded funds, the Administrator of SRS issued a PIQ (an official SRS policy interpretation) clarifying the regulation on August 27, 1974. Appendix B. The PIQ makes clear that recoupment in non-willful withholding of information cases (covered by 233.20(a)(12)(i)(a)(1)) is only permissible from the disregarded income and not from the net non-exempt income (regarded income). Thus such fears should now be allayed.

Thus the
conflict
in our
HEW letter
is resolved.

[+]
Please disregard all interlineations and marginal notes.

to that family during the month is measured against the standard of need which has been determined by the state. For the sake of illustration we will employ the figures used by the Court in its hypothetical example (memorandum at 24). If the need standard is \$200 per month for a family of a given size, and that family has no earned income during the month in question, a state which has chosen to pay recipients at 100% of need would pay the family \$200. 4/ In such a case there is no income to be disregarded. Assuming, however, that the family earned \$120 during the month, in determining eligibility for assistance 5/ and the amount of assistance, the income disregards are applied. Applying the disregard set forth in section 402(a)(8)(A)(ii) of the Social Security Act, the first \$30 of such earned income and one-third of the remainder is disregarded for the purposes of determining the amount of assistance. Subtracting the \$30 from the \$120 leaves \$90 and one-third of this \$90 equals \$30. This latter \$30 is added to the first \$30 to arrive at the total disregarded income pursuant to this section which in this case equals \$60. This figure (the disregarded income) is then subtracted from the amount of earned income to compute the "regarded" income (which here equals \$60 as well). The regarded income is then subtracted from the need standard or payment standard to calculate the amount of the assistance grant. (In those states which do not pay at 100% of need, the percentage of need adopted by the state is then applied to this figure to determine the amount of the assistance grant or this percentage may be applied to need before subtracting the regarded income, see Jefferson v. Hackney, 406 U.S. 535, 539 (1972).) 6/ Since the "regarded" income in our hypothetical was less than the need standard the recipient is eligible for some assistance. The amount of the grant (at 100%) would be \$140. 7/ This completes

4/ A state need not choose to pay recipients 100% of need Dandridge v. Williams, 392 U.S. 421 (1970)

5/ The income disregard specified in section 402(a)(8)(A)(ii) is only applicable in determining eligibility if that person was receiving such assistance during one or more of the preceeding four months. (§402(a)(8)(D))

6/ A state may also impose maximums on the amount of its grants.

7/ It should be noted that for the month in question the recipient in this hypothetical actually takes home \$260 (\$120 from work and \$140 from the grant) which is \$60 above the need standard.

the first step of the process and fulfills the statutory mandate to apply the \$30 plus 1/3 earned income disregard. 8/

* If there has been a previous overpayment for which the state seeks now recoupment from the recipient, a separate operation and analysis must be performed. Whatever results are achieved in this process will not disturb the determination of eligibility reached above nor the amount of the assistance payment which has been determined "after all policies governing the reserves and allowances and disregard or setting aside of income and resources ... have been uniformly applied"^[+] (45 C.F.R. section 233.20(a)(3)(ii)).

In cases where there has been an overpayment, HEW regulations permit recoupment pursuant to 45 C.F.R. §233.20 (a)(12). The language of the regulation is somewhat ambiguous and has been clarified by an interpretation by the Administrator of SRS (Appendix B). The regulation as amplified by the interpretation permits a state to recoup from the grant if the recipient has income or resources currently available in the amount by which the agency proposes to reduce the assistance payment. This regulation does not authorize recoupment from the current assistance grant or from the recipient's net non-exempt income which has been considered in determining and reducing the welfare grant. (In the above discussion we have referred to this "net non-exempt income" as the "regarded" income.) Pursuant to N.W.R.O. v. Weinberger, 377 F. Supp. 861 (D.D.C. 1974), the Department does not permit recoupment from the grant when there is no currently available income or resources other than the grant itself except in cases where the recipient has willfully withheld relevant information from the State agency. 9/ Thus the regulation specifically

8/ A state is required to employ the disregard in making the determination of eligibility and need for a given month. References to need in the recoupment context are to the figure obtained in this initial step.

9/ The Court (memorandum at 35) refers to HEW's amicus curiae position in Hagans v. Wyman, (E.D. N.Y. July 28, 1975, Docket No. 72 C 132) to support its belief that the Department considers involuntary recoupment improper absent willfulness on the part of the recipient. The Department's brief in Hagans supra, when referring to involuntary recoupment, was addressed to a situation where the sole source of funds for the recoupment would be from the current assistance grant and not a situation where there was available income from "disregarded" funds. Thus before discussing voluntariness,

-22-

[+] Please disregard all interlineations and marginal notes.

permits recoupment of overpayments from disregarded income. 10/

The recoupment process in our hypothetical case proceeds as follows: If there was an overpayment of \$100 due to agency error which the state now seeks to recoup, the state must first determine whether the recipient has any income or resources during the month in which the recoupment takes place which are "currently available" for recoupment. The amount of the assistance payment has been fixed at \$140 but it alone cannot provide the funds for recoupment because of NWRO v. Weinberger, supra, and HEW policy which protects this amount. Nor would the \$60 of "regarded income" (which is protected by the statute and implementing regulation as "net non-exempt income") be available for purposes of recoupment. Thus, a total of \$200 which is equal to the full need standard is protected. (Since a state may elect not to assist at the 100% level, the amount protected under the regulation would in those states equal that level at which they choose to assist.) Thus under HEW regulations, the State could recoup up to \$60 per month from this family (until the overpayment had been repaid). Our understanding of Minnesota policy is that they limit recoupment from disregarded income to one-half of the disregarded income (which is available for recoupment under HEW regulations) during a given month, thus providing the hypothetical recipient with an additional \$30 (since the disregarded income was \$60 and half of that

9/ (Continued)

the memorandum noted,

[W]e may also assume that the recipient does not have income or resources in excess of the current assistance grant currently available from which to repay the previous overpayment. (Memorandum for the United States as Amicus Curiae, Hagans v. Wyman, supra, at 5)

Since the Department considers disregarded income (with certain exceptions noted in footnote 10 infra) to be available for recoupment, there is no conflict with HEW's policy revealed in its brief in Hagans v. Wyman.

10/ However, no recoupment from income which is encompassed by the disregards which are enumerated at 45 C.F.R. 233.20(a) (4)(ii) (a), (d), (f), and (i) is permissible because of the language of the statutes which establish them. This contrast in the statutory language of these disregards with the language of the earned income disregard will be discussed at greater length infra at 14-15.

equals \$30). The total take home income during the month after the recoupment has been deducted would equal \$230.

Since the state can recoup the amount of money it proposes to recoup only because of the existence of the disregarded funds, where no other source for recoupment is available it might be argued that reducing the payment by deducting the recoupment constitutes a redetermination of the amount of the assistance grant. HEW does not accept this interpretation. The choice to take the recoupment from the assistance payment ^[+] (when there are available disregarded funds in an equal amount) is considered one of administrative convenience on the part of the state. Essential to this analysis is an understanding of the concept of "currently available income and resources." Income which is earned during the course of the month in question is considered to have been currently available during the course of that month. Indeed, this must be the case, for to conclude that the income is currently available on a day when the computation of the monthly grant is made only if the recipients physically possess it on that day, would make the computation of need impossible; a recipient could spend the funds before the date of the computation and then claim that he has no income currently available. Thus for the state to deduct the amount of the recoupment from the benefit check does not constitute a reduction in the amount of the grant. The income received which had been disregarded for purposes of determining the grant is available to the recipient in lieu of the amount recouped from the grant check to meet the need standard or portion thereof which the state has undertaken to provide. ^[+] No recomputation of the grant is involved, since the figure which was ascertained in the determination of need remains constant and the recoupment is substantively taken from the other available income which was never used to reduce the grant. Recoupment from the disregarded income therefore, would not leave the recipient with less income than the need standard or the percentage thereof which the State has decided to provide.

ARGUMENT .

- A. RECOUPMENT FROM DISREGARDED INCOME OF PRIOR OVERPAYMENTS CAUSED BY AGENCY ERROR IS FULLY CONSISTENT WITH THE PURPOSE OF TITLE IV AND IS PERMITTED BY H.E.W. REGULATIONS.

HEW's recoupment regulation permits, but does not require, states to reduce a recipient's current assistance payment in order to recover prior overpayments which were caused by agency error provided that the recipient has income or resources currently available in the amount by which the agency proposes to reduce the payments, 45 C.F.R. 233.20(a)(12)(1) (a)(1). ^{11/} The regulation is essentially one which furthers the states' interest in fair, equitable, and efficient administration of their AFDC programs by providing them with a vehicle to recover overpayments so that the vast majority of welfare recipients who do not receive such windfalls are not disadvantaged at the expense of those who do. Since the states have finite resources that they can budget for purposes of assistance, overpayments to some recipient may result in an eventual reevaluation of the level of assistance a state will provide to all recipients so that it does not exceed its fiscal constraints.

HEW does not mandate that the states recoup because program conditions in the states vary. For instance, states differ in the amount of funds which they allocate to their AFDC programs; ^{12/} some states pay need in full as determined according to their states' standard, while others pay varying percentages of that need. Since conditions and fiscal resources vary considerably among the states, the

^{11/} Recoupment of overpayments from the grant in the absence of other currently available income or resources (such as the earned income disregard) is not permitted except in cases of willful withholding of information by the recipient. 45 C.F.R. §233.20(a)(12)(1)(a)(2).

^{12/} The Supreme Court has noted that each state has the "undisputed power...to set the level of benefits and the standard of need[t]here is no question that States have considerable latitude in allocating their AFDC resources, since each State is free to set its own standard of need and to determine the level of benefits by the amount of funds it devotes to the program." *Dandridge v. Williams*, 397 U.S. 471, 476 (1970) quoting *King v. Smith*, 392 U.S. 309 (1968).

necessity for recouping overpayments in order to attain a fair apportionment of funds may also vary. Therefore, recoupment under HEW's regulation is at the State's option. That states be permitted to recoup overpayments is, however, fundamental since states have limited AFDC resources. ^{13/}

Should the state agency's funds become prematurely depleted, the agency may be required to reduce benefits to all recipients, ^{14/} or it may be precluded from raising benefits to all recipients. (See Jacquet v. Bonin, Civ. No. 72-2589 (E.D. La. July 21, 1975) (Attached as Appendix D. at 4.) By definition, an overpayment is a windfall, a payment to which the recipient was not entitled. By permitting states to recover such payments, the vast majority of recipients are not disadvantaged. The state's ability to recoup is especially important as a result of HEW's quality control regulations at 45 C.F.R. 205.41. These regulations provide that the federal government will not match state overpayments above a certain error rate level. Therefore, since the federal government will not be providing any funds for erroneous payments above a certain percentage level, each overpayment of assistance operates even more directly in depleting a state's limited pool of welfare funds.

^{13/} This has been judicially recognized in Lomax v. Lavine, 72-Civ. 2457 (S.D. N.Y., decided July 31, 1972), where the court noted that "public fisc is not unlimited." Memorandum opinion, at 11 and in Jefferson v. Hackney, 406 U.S. 535 at 541 (1972) the Court stated: "[S]ince Texas' pool of available welfare funds is fixed, any increase in benefits paid to the working poor would have to be offset by reductions elsewhere."

^{14/} If a state which presently recoups overpayments from disregarded income is no longer permitted to do so, and is unwilling to spend additional funds for its assistance programs, it may choose either to cut back on some of the optional programs in which it may at present be participating (e.g., the AFDC-unemployed fathers program, 42 U.S.C. §607) or may choose to lower its standard of assistance.

Such action has in fact occurred in Illinois where after the decision on Mandley v. Trainor, (C.A. 7, Nos. 75-1033 and 75-1245) Sept. 25, 1975, which gave the state a choice either to broaden its emergency assistance program or drop it, the state decided to drop the program. (See Appendix C.)

B. RECOUPMENT OF PRIOR OVERPAYMENTS CAUSED BY AGENCY
ERROR DOES NOT CONTRAVENE SECTION 402(a)(7) OF THE
SOCIAL SECURITY ACT.

Section 402(a)(7) of the Social Security Act, in relevant part, provides that "the State agency shall in determining need, take into consideration a mother's income and resources of any child or relative claiming" AFDC. The Supreme Court has interpreted this provision to preclude a state from assuming the availability of income to a recipient absent a showing that such income was "in fact" available to the recipient. Thus, in King v. Smith, 392 U.S. 309 (1968), and Lewis v. Martin, 397 U.S. 552 (1970), the Court disapproved state regulations which permitted a state agency to consider income of an individual who was cohabiting with a child's mother or of a non-adoptive step-father (who had no legal duty under state law to support the child) in determining whether a child was needy. The Court did not preclude such income from being considered where it was actually being made available to support the child.

In plaintiffs' view, the recoupment by DPW for overpayments caused by agency error violates this "assumption of income" rule by allowing recoupment of the overpayments "even where funds attributable to the overpayments are no longer available to meet the needs of the AFDC family."

(Plaintiffs' memorandum at 4) Plaintiffs further assert,

"DPW may not argue that the earned income disregard provides the 'actually available' income necessary to meet the additional need left unmet by the reduction in the grant. The earned income disregard, is by definition, to be disregarded in determining the family's need." (Id. at 6, emphasis in original.)

Plaintiffs' view is incorrect since the disregarded income is in fact actually available income to the recipient in the amount of the proposed reduction in the assistance payment. It is the existence of the disregarded income which distinguishes this factual situation from that in N.W.R.O. v. Weinberger, supra. (In N.W.R.O. v. Weinberger, the only money available for recoupment was from the welfare grant itself and thus the Court focused upon the assumption of income rule regarding whether the overpayment was still available to the recipient.)

Although plaintiffs are correct in stating that the disregarded income is to be ignored in determining the family's need, the crucial focus should be upon the words "determining need" rather than on the word "disregard." Indeed the Court has so recognized. (memorandum at 27) Under H.E.W.'s recoupment regulations, the income which is encompassed by the disregard is not counted toward the determination of a family's need or the amount of assistance payment at that point when this determination occurs. (See the discussion at pages 2-3, supra.) Plaintiffs mistakenly conclude that because such funds cannot be counted at the point when the need is determined, these funds may also not be considered available for recoupment. There are a few income disregards for which plaintiffs' conclusion would be correct (see the discussion at pages 14-15, infra). Congress, in these exceptional instances, employed language which clearly precludes recoupment but did not use similar language in §402(a)(3)(A)(ii).

The remaining issue to be addressed is the effect of the Department's recoupment regulation upon the work incentive objective which underlies the earned income disregard. Although the Department believes that all earned income covered by the disregard of §402(a)(3)(A)(ii) is available for recoupment of overpayments, the Department does not mandate that the states treat the disregarded funds as 100% available for such purpose. In fact, Minnesota has chosen to recoup from only up to one-half of the disregarded funds per month in order to recover overpayments. Thus the remaining one-half of the disregarded funds per month (during recoupment of an overpayment) serve as a work incentive for the recipient consistent with the Congressional objective for the disregard provision.

It is important to distinguish the present factual context with that which formed the basis for the decision in Mr. X v. McGorkle, 333 F. Supp. 1109 (D. N.J. 1970), affirmed in relevant part, sub nom Engleman v. Amos, 404 U.S. 23 (1971). The Court's objection to the New Jersey plan in Mr. X v. McGorkle, supra was that it totally ignored the

Problem with this may be H.E.W.'s failure to argue regulation non-optional. Incentive factor generally non-existent in Minnesota case. H.E.W. does not cite statute. P. 12

[+] Please disregard all underlines and marginal notes.

Congressional mandate to apply the statutorily prescribed income disregard formula in determining need and instead imposed a formula which did not at all provide for the work incentive as Congress envisioned. As the Court stated,

"Section 615 contravenes the mandate of 402(a). New Jersey does not deduct the 'statutory disregards' from the earned income of any applicant for AFDC assistance. Although the statute does not require these deductions in the circumstances set forth in 402(a)(3)(D), New Jersey does not provide them in any situation where an AFDC applicant is employed."

Furthermore, the administrative ceiling in the New Jersey regulations, though in excess of need, does not provide a work incentive to each member of the family." (Mr. X v. McCorkle, supra at 1116-1117. Emphasis by Court.)

From the above excerpt, it is quite apparent that the situation in New Jersey was markedly different from that in Minnesota or from any situation contemplated or authorized by H.E.W. regulations. New Jersey completely ignored the Congressional mandate to apply the income disregards in determining the needs of the recipients. The Court in McCorkle, emphasized the comprehensiveness of the state's flouting the statutory scheme. By contrast, Minnesota does not ignore the statutory disregards, but in fact applies them at all times when they are to be applied in making the determination of the recipients' need. The recoupment regulations do not authorize a state to ignore the statutory disregards. In fact in order to determine whether there exists any income from which recoupment is permissible, the statutory disregards must have been applied, at the first step in the process.

The Court has urged (memorandum at 32-33) that Minnesota's recoupment policy contravenes the work incentive rationale of the statutory disregards which was articulated in Mr. X v. McCorkle, supra, because it only provides a disregard of \$1.00 in every \$6.00 earned rather than slightly over \$1.00 in every \$3.00 earned. As we have noted, Minnesota must, in fact, apply the Congressionally mandated disregard and to our knowledge does. The Court has recognized that Minnesota's position has an "undeniable logic" (memorandum at 33) since it retains the present work incentive, but then rejects this procedure based upon its misperception of H.E.W.'s recoupment regulations. But even had Minnesota chosen to recoup from

100% of the disregarded income, it would not have nullified the work incentive objective prescribed by the Congress, nor would it have abandoned the \$30 plus one-third formula of the statute for making the initial need determination. All recipients of AFDC would still have the earned income disregard as a work incentive. Only those who had benefitted by overpayments would be subject to recoupment and as soon as the overpayment had been recovered, the recipient would again have the advantage of the immediate incentive. However, even during the period of recoupment, the work incentive is not frustrated. A recipient would not likely quit his present employment because of the recoupment, since such action would result in the application of the sanction prescribed in §402(a)(8)(B) and (C) or if a WIN registrant (under title IV Part C) the sanction provided in §402(a)(19)(F). 15/

In considering the rationale of Congress in enacting the disregards the Court should also consider another component beside the work incentive. The work incentive was merely one expression of a greater desire on the part of the Congress to reduce the cost of welfare. Thus in the Report of the Committee on Ways and Means on H.R. 12030 (The Social Security Amendments of 1967) the underlying rationale for the income disregard provisions and the work incentive programs was articulated as follows:

- 30 -

15/ Sections 402(a)(8)(B) and (C) provide that if the recipient terminated his employment without good cause, he shall not have the benefit of the earned income disregard during a period of at least 30 days from the time that the recipient terminated his employment. Section 402(a)(19)(F) provides that for recipients subject to the WIN program, the failure to take employment without good cause would disqualify such person from benefits and also provides that protective payments would be made to the dependent children.

"Your committee has become very concerned about the continued growth in the number of families receiving aid to families with dependent children (AFDC). *** Moreover, according to estimates of the Department of Health, Education, and Welfare, the amount of Federal funds allocated to this program will increase greatly ... over the next 5 years unless constructive and concerted action is taken now to deal with the basic causes of the anticipated growth."

"Your committee has studied these problems very carefully and is now recommending several coordinated steps which it expects, over time, will reverse the trend toward higher and higher Federal financial commitments in the AFDC program. *** The committee is recommending the enactment of a series of amendments to carry out its firm intent of reducing the AFDC rolls thus reducing the Federal financial involvement in the program. These changes are --

(2) A requirement that all States have an earnings exemption to provide incentives for work by AFDC recipients."
House Report No. 544, 90th Cong. 1st Session 95-96 (1967)

From the Committee Report it is obvious that the work incentive, although an integral part of the legislation, was designed to lessen the expenditures for the AFDC program. Although Congress was concerned with Federal expenditures, it would appear incongruous with the general intent to reduce welfare expenditures for the Court to interpret the specific provisions of the income disregards in such a way as to preclude states from recouping overpayments from such funds when the work incentive remains and the Congressional formula pertaining to such disregards is in fact followed in computing the recipient's grant. Accordingly, the recoupment regulations by permitting the states to recapture overpayments (thereby limiting welfare costs) while the at the same time continuing the work incentive provided by Congress, are consistent with the provisions of section 402 (a) (7) and (8).

The recoupment regulations are designed so that no actual reduction below the level at which the state has chosen to pay recipients is possible. Thus, Minnesota's contention that no actual reduction below the need level occurs is not an ex post facto justification of its system

for recoupment. It is necessary to realize that the money to meet the needs according to the state's payment standard is not in fact reduced by the recoupment. The recoupment is conceived of as being captured from the disregarded funds with the assistance payment remaining the same. Rather than physically collecting the earned income for this purpose and paying the same size assistance check, for purposes of administrative convenience, the state has chosen to reduce the amount of the assistance check and to tell the recipient that the remainder of this assistance payment is located in the equivalent amount of the disregarded income that he already possesses.

The earned income disregard found in §402(a)(8) is not the only disregard provision created by Congress. H.E.W.'s recoupment policy recognizes that certain disregarded income is not available for purposes of recoupment by virtue of the statutory language employed in creating those disregards.

"[C]ertain disregarded amounts are, by the language of their specific statutes, protected and are not available for recoupment. These are:

Any grant or loan to any undergraduate student for educational purposes made or insured under any program administered by the Commissioner of Education under the Higher Education Act;

The value of the bonus coupon allotment under the Food Stamp Act of 1974, as amended;

The value of supplemental food assistance under the Child Nutrition Act of 1966 and the special service program for children under the National School Lunch Act;

Benefits received under Title VII, Nutrition Program for the Elderly, of the Older Americans Act." (Appendix B.)

Section 507 of the Higher Education Amendments of 1968 provides the basis for the first of the above disregards.

"For the purposes of any program assisted under I, IV, X, XIV, or XIX of the Social Security Act, no grant or loan to any undergraduate student for educational purposes made or insured under any program administered by the Commissioner of Education shall be considered to be income or resources." (Emphasis supplied.)

Since this language prohibits the consideration of the funds encompassed by this income disregard as income or resources for the purposes of any program assisted under the enumerated titles of the Social Security Act, recoupment from such funds would be barred. Also, since the Department requires the recipient to have income or resources currently available in order for there to be recoupment (except in the cases covered by 45 C.F.R. §233.20(a)(12)(i)(a)(2), the language of the Higher Education Amendments disregard precludes such funds from being considered as income or resources (which makes them unavailable for recoupment.)

The Food Stamp Allotment disregard also demonstrates that Congress has employed disregard language which would preclude recoupment. Section 7(c) of the Food Stamp Act of 1964 provides that the value of the coupon in excess of the amount charged any eligible household,

"shall not be considered to be income or resources for any purpose under any Federal or State laws including, but not limited to, laws relating to taxation, welfare, and public assistance programs." (Emphasis supplied.) 7 U.S.C. §2016(c).

Clearly in the area of income disregards, Congress has in particular situations employed language which precludes recoupment when it chooses to do so.

The disregard of benefits received under title VII, Nutrition Program for the Elderly, of the Older American Act contains language which is less clear but the Department has decided to prohibit recoupment from such benefits from being exposed to recoupment.

"No part of the cost of any project under this subchapter may be treated as income or benefits to any eligible individual for the purpose of any other program or provision of State or Federal Law." 42 U.S.C. §3045h

Despite the use of the ambiguous term "benefits" this statutory provision also appears to exclude recoupment since "benefits" may include resources.

The contrast of these four disregards with the language of the earned income disregard of §402(a)(8) is clear. The latter section is limited in application to the determination of need and does not place a limitation upon the use of the disregarded funds which would preclude recoupment of overpayments from such income.

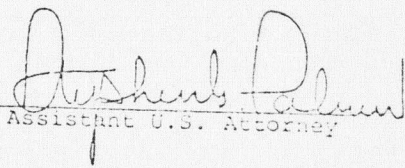
Clearly, Congress has employed language in disregard provisions which precludes recoupment, but chose not to use such language in the §402(a)(7) and (8) income disregard thus not foreclosing the recoupment of overpayments from such funds.

CONCLUSION

For the foregoing reasons, the Department believes that the State of Minnesota's regulations and practice of recouping prior overpayments from income disregarded under §402(a)(8) is consistent with H.E.W.'s regulations in this area. Furthermore, the Department believes that the regulations as interpreted and explained above are wholly consistent with the purposes of title IV and with sections 402(a)(7) and (8) of the Social Security Act.

Respectfully submitted,

ROBERT G. RENNER
UNITED STATES ATTORNEY

By 
Assistant U.S. Attorney

February , 1976

OF COUNSEL:

ST JOHN BARRETT
ROBERT P. JAYE
DAVID R. SMITH

Office of the General Counsel
Department of Health, Education
and Welfare

*Appendices C and D to this Memorandum are
omitted.*

APPENDIX A

§ 3-1.702-3 Conclusiveness of certificate of competency.

As provided in the Small Business Act (15 USC 837(b)(7)), procurement agencies are required to accept SBA certificates of competency as evidence of a prospective contractor's responsibility as to capacity and credit. The SBA will make the following a condition of such certificates of competency:

(2) carbon copy to the operating agency's headquarters procurement office.

JOHN OTTUNA.

CHAPTER 5A—FEDERAL SUPPLY SERVICE, GENERAL SERVICES ADMINISTRATION

Subpart 5A-1.2—Definition of Terms

HEAD OF THE PROSECUTING ACTIVITY

Section 5A-1.205 is revised as follows:

§ 5A-1.206 Head of the procuring activity.

cludes: (a) In the Central Office, the appropriate Assistant Commissioner and the appropriate division director and (b) in the regional offices, the Regional Commissioner, FBS, and the appropriate Regional Director, Procurement Division or Transportation Management Division.

(Sec. 305, c), 63 Stat. 250; 40 U.S.C. 490(c))

Dated: June 10, 1974

Title 45—Public Welfare
CHAPTER II—SOCIAL AND REHABILITATION SERVICE (ASSISTANCE PROGRAMS), DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE

Recoupment of Overpayments and Correction of Underpayments

[illegible]

Although formal rulemaking proceedings were required, a notice of proposed rulemaking was published in the Federal Register on June 15, 1970. Commenters were requested to reply within 60 days. A second notice of proposed rulemaking was published on July 14, 1970, and invited comments by the interested public and by the States. Comments received were reviewed and a final rule was published on August 10, 1970. The rule was effective on September 1, 1970. The rulemaking process was completed on September 1, 1970. The rulemaking process was completed on September 1, 1970.

\$ 233.20 Need and amount of assistance.

(a) *Requirements for State plans.* * * *

(12) *Recompense of overpayments and correction of underpayments. Specifically, uniform procedures should be:*

(4) Recoupment of overpayments of assistance, including certain overpayments resulting from assistance paid pending hearing decisions.

(d) The State may not recoup any overpayment previously made to a recipient.

(4) Unless the recipient has income or resources exclusive of the current assistance payment currently available in the amount of which the agency proposes to reduce payments, direct loan

(2) Where such overpayment, or occasional or casual by the recipient, willful withholding of information concerning his income resources or other circumstances which may affect the amount of payment, the State may recover prior overpayments from such a taxpayer's rights irrespective of such income or resources.

(U) Withholding of information will
be subject to the provisions of paragraph
(c)(7)(D)(ii)(I) of the section cited.
The following:

[illegible][illegible]

(c) To require release of a ...
which the President knew ...

Government, or (2) to the State Agency of Receipt of the Funds, and the prior check to the amount which the State had previously received in the special deposit fund of the State (see 1939-40) of this category to represent an overpayment and credit a sum to which the recipient would be entitled in making a disbursement pursuant to this provision in 1940-41, all relevant circumstances relating to the amount by which the overpayment exceeded the previous amount shall be considered.

(c) Each periodic notification is paragraph (a)(1)(i)(b)(1) of this plan shall:

(4) Includes a reminder that if a recipient's continuing obligation to him for the State Agency contains timely information concerning earnings, income, resources, or other conditions which may affect the amount payable, within a reasonable period after such change, the payee may also be notified that a failure to notify the State Agency within the allotted time period may constitute a full withholding of such information permit the State Agency to recover overpayment, avoidance of award or denial of award.

(2) Specifically and comprehensively in simple paratextual elements, such as information to be obtained by reading, reading strategy is used.

RULES AND REGULATIONS

...and frequent times of newly occurring...
...to note that if there is any doubt...
...constituted such persons...
...of a designated representative...
...within a reasonable specified...
...of time after such change in circum-

...If the State plan provides for re-
...in paragraph (a)(12)(i) (a)(12)(ii) of
...section, notify the recipient that if
...the check received exceeds the prior
...check by a specified amount (which
...amount may not be less than that which
...a reasonable man should have known was
...erroneous), this increased check may
...constitute a sum to which the recipient
...is not entitled. In such situations, the
...notification may require that the recipient
...notify the State agency of a designat-
...ed representative within 24 hours. The recipient may also
...be notified that a failure to so notify the
...State agency within the designated time
...period may constitute a waiver of the
...right of such information and permit the
...State agency to recover such overpay-
...ment.

(d) The State agency shall require
...periodic formal acknowledgment of re-
...cipients (on a form limited for this pur-
...pose) that the preceding conditions of
...this paragraph have been brought to the
...recipient's attention and that they were
...understood.

(e) Any recoupment of overpayments
...made under circumstances other than
...those specified in paragraph (a)(12)(i)
...of this section shall be limited to
...overpayments made during the 12
...months preceding the month in which
...the overpayment was discovered.

(f) Any recoupment of overpayments
...permitted by paragraph (a)(12)(i) (a)
...of this section may be made from
...available income and resources (including
...disregarded, set-aside or reserved
...items) or from current assistance pay-
...ment or from any other source. The
...State shall, on a case-by-case basis,
...limit the proportion of such payments
...that may be deducted in such cases, so
...as not to cause undue hardship or re-
...cipients.

(g) The plan may provide for re-
...coupment in all situations specified
...herein, or only in certain of the circum-
...stances specified herein, and for waiver
...of the overpayment where the cost of
...collection would exceed the amount of
...the overpayment.

(h) Election by the State not to re-
...coup overpayments shall not waive the
...provisions of § 101.43, and § 54.41, or
...any other quality control requirement.

(i) Prompt correction of underpay-
...ments to current recipients, resulting
...from administrative error where the

State plan provides for recoupment of
...overpayments. Under this requirement:
(1) retroactive corrective payments
...shall be made only for the 12 months
...preceding the month in which the under-
...payment is discovered.

(2) For purposes of determining con-
...tinued eligibility and amount of assis-
...tance, such retroactive corrective pay-
...ments shall not be considered as income
...or as a resource in the month paid for in
...the next following month; and

(3) No retroactive payment need be
...made where the administrative cost
...would exceed the amount of the pay-
...ment.

(48-1101, 49 Stat. 647, (U.S.C. 1703.1)
(Title of Federal Domestic Assistance Pro-
...gram No. 1431, Public Assistance—
...State Assistance (State A-54))

Effective date: The regulations in this
...section shall be effective July 13, 1974.

Dated: June 12, 1974.
James S. Dwight, Jr.,
Administrator, Social and
Rehabilitation Service.
Approved: June 12, 1974.
Francis Cantucci,
Acting Secretary.
(FR Doc 74-14231 Filed 6-20-74; 8:45 am)

PART 100—ADMINISTRATION OF
NATIONAL ASSISTANCE PROGRAMS
Medicaid; Federal Financing for Assisted
Housing; Correction

Transfer: Federal Documents 14-11172,
published at page 11941 in the issue
dated Monday, May 20, 1974, is corrected
to read "through (D)" in paragraph
(b)(1)(i) and (C)" in paragraph
(b)(2)(ii) to read "paragraphs (b)(1)
(b)(2) through (D)".

Approved: June 11, 1974.
Thomas S. McVie,
Deputy Assistant Secretary for
Management Planning and
Technology.
(FR Doc 74-14231 Filed 6-20-74; 8:45 am)

Part 67—Telecommunications
CHAPTER 1—FEDERAL
COMMUNICATIONS COMMISSION
(Docket No. 10222)

PART 2—FREQUENCY ALLOCATIONS AND
RADIO TREATY MATTERS: GENERAL
RULES AND REGULATIONS

PART 99—PUBLIC SAFETY RADIO
SERVICES

PART 91—INDUSTRIAL RADIO SERVICES
PART 95—LAND TRANSPORTATION
RADIO SERVICES

Future Use of Certain Frequency Band;
Order Setting Data for Frequency

In the matter of an inquiry relative to
the future use of the frequency band
535-545 MHz and amendment of Parts
1, 19, 21, 23, 24, 25, 91, and 93 of the

Rules Relative to Operations in the Land
Mobile Service Between 535 and 545
MHz, Docket No. 10212

Order: 1. Informal request was
made to set a date for filing oppositions
to petitions for reconsideration submitted
in the above-captioned proceeding. The
petitions in question are directed to the
Commission's Second Report and Order
in Docket No. 14521, 39 FR 10521 (May
12, 1974). These petitions were not all
filed on the same date; consequently,
under procedures established in the rules,
the time for filing oppositions to the
petition varied. For administrative con-
sistency, it is desirable to have the time
for all oppositions uniform, and the
action time is taken for this purpose in
conformity with the mentioned request.
2. Accordingly, pursuant to the pro-
visions of § 101.103 of the rules and
regulations, the date for filing oppo-
sitions to the several petitions for re-
consideration filed in this Docket is estab-
lished as June 14, 1974.

Adopted: June 12, 1974.
Released: June 12, 1974.
Federal Communications
Commission,
(SEAL) AMSTER D. HANCOCK,
General Counsel.
(FR Doc 74-14231 Filed 6-20-74; 8:45 am)

Part 49—Transportation
CHAPTER 1—INTERSTATE COMMERCE
COMMISSION
SUBCHAPTER A—GENERAL RULES AND
REGULATIONS

(Second Part, 5.0-1112)

PART 1022—CAR SERVICE
Railroad Operating Regulations for Freight
Car Movement

As a session of the Interstate Com-
merce Commission, Railroad Service
Board, held in Washington, D.C. on the
13th day of June 1974.

It appearing, that there are acute
shortages of freight cars throughout the
country; that certain carriers are unable
to furnish an adequate supply of freight
cars to shippers located on their lines;
that these shortages of freight cars are
impeding both the domestic and export
movements of agricultural, mineral,
forest, and manufactured products, and
other commodities; and that the existing
car service rules, regulations, and prac-
tices of the railroads are inconsistent with
respect to the time, supply, control, move-
ment, distribution, exchange, and return of freight cars to
meet the requirements of shippers. It is
the opinion of the Commission that an
emergency exists requiring immediate
action to promote car service in the in-
terest of the public and the commerce
of the people. Accordingly, the Commis-
sion finds that notice and public proce-
dure are impracticable and contrary to
the public interest, and that good cause
exists for making this order effective
upon less than thirty days' notice.

APPENDIX B

MEMORANDUM

DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE
SOCIAL AND REHABILITATION SERVICE
REGION I

CONFIRMATION COPY

7/19/74

James Delaney, II, Director
Executive Secretariat

DATE: July 11, 1974

Our reference: AP

VIQ

TO : Regional Commissioner

SUBJECT: Request for Clarification of CFR 233.20(a)(12)(1)(1)

We are asking your interpretation of this specific Federal requirement which reads as follows:

- (a) The State may not recoup any overpayment previously made to a recipient:
 - (1) Unless the recipient has income or resources exclusive of the current assistance payment currently available in the amount by which the agency proposes to reduce payments.

One of our State Welfare agencies is asking whether recoupment can be made from any income i.e., disregarded income as well as income considered in determining the grant, where the overpayment did not result from fraud or "wilful withholding of information".

Your interpretative clarification of the specific requirement would be most helpful.

Donald P. Fallon
Donald P. Fallon

Mr. Neil P. Fallon
Regional Commissioner, SR3
Boston

DATE: AUG 27 1974

PIC-44-111

FROM : Administrator
Social and Rehabilitation Service

SUBJECT: Request for Clarification of 45 CFR 233.20(a)(12)(i)(1)

This is in response to your memorandum of July 11 in which you requested interpretive clarification of 45 CFR 233.20(a)(12)(i)(1).

45 CFR 233.20(a)(12) became effective July 10, 1974, and the section in question (i)(1) provides that:

"(a) The State may not recoup any overpayment previously made to a recipient:

- (1) Unless the recipient has income or resources exclusive of the current assistance payment currently available in the amount by which the agency proposes to reduce payments"

In cases where the overpayment did not result from fraud or willful withholding of information, this section of the regulation is interpreted to provide that a State welfare agency may recoup from any exempt income or resources that are available. However, certain disregarded amounts are, by the language of their specific statutes, protected and are not available for recoupment. These are:

Any grant or loan to any undergraduate student for educational purposes made or insured under any program administered by the Commissioner of Education under the Higher Education Act;

The value of the bonus coupon allotment under the Food Stamp Act of 1964, as amended;

The value of supplemental food assistance under the Child Nutrition Act of 1966 and the special service program for children under the National School Lunch Act;

Benefits received under Title VII, Nutrition Program for the Elderly, of the Older Americans Act.

Page 2 - Mr. Neil P. Fallon

In the absence of fraud or wilful withholding of information, a State Agency may not recoup from the current assistance payment or the non-exempt income counted in the computation of the current assistance payment. This interpretation is supported by my July 10 letter to State Welfare Directors regarding the issuance of this regulation revision which states, in part,

" . . . please note that subsection (a)(1) of the revised regulation is to be interpreted as though the words "exclusive of the current assistance payment" had been omitted. Thus, this provision does not authorize recoupment from non-exempt income which has been considered in determining the welfare payment."

James S. Wright, Jr.

No. 285 (1975)

Hennepin County

Kelly, J.

Lucille Steere,

Appellant,

45615 vs.

State of Minnesota, Department of
Public Welfare,

Respondent,

Hennepin County Welfare Board,

Respondent.

Endorsed
Filed May 21, 1976
John McCarthy, Clerk
Minnesota Supreme Court

S Y L L A B U S

1. Under the circumstances in this case, the Minnesota Department of Public Welfare could recoup overpayment from an AFDC recipient's subsequent grants without specific Minnesota statutory authorization.

2. Income tax refunds are net income actually available for use on a regular basis within the meaning of 45 CFR 233.20(a)(3)(ii)(c) and may be considered income to be applied to current need in the AFDC grant structure.

3. Under the facts of this case, Minnesota and Federal recoupment regulations are consistent with the Social Security Act.

Affirmed.

Heard before Kelly, Todd, and MacLaughlin, JJ., and considered and decided by the court en banc.

O P I N I O N

KELLY, Justice.

Appellant, Lucille Steere, a recipient of Aid to Families with

Dependent Children (AFDC),¹ appeals from an order of the district court affirming a determination of the commissioner of public welfare which authorized recoupment of certain amounts from her AFDC grant. We affirm.

Appellant has been a recipient of AFDC for her needs and those of her two minor children since 1972. She was employed during 1973, and her employer withheld a portion of her earnings for state and Federal income taxes. In January 1974, the Hennepin County Welfare Department (hereafter the Welfare Department) sent appellant and other AFDC recipients a printed card which read in relevant part:

"State and federal income tax refunds are considered available to meet need. These refunds must be reported to the County Welfare Department at the time they are received. Some adjustment in your grant will be necessary to allow for this income. If you have any questions please call this agency."

On February 14, 1974, the Welfare Department also requested of appellant copies of her state and Federal tax returns. She promptly supplied the returns.

Appellant received a Federal income tax refund of \$155.70 on March 24 and a state income tax refund of \$67.10 on March 26, for a total of \$322.80 in refunds. She spent the refunds almost immediately and before April 1, 1974, on food, clothing, heating, and other necessary items for her family. Although she admitted receiving the card instructing her to report the refunds when received, she did not do so. When she telephoned her eligibility technician in early April to ask a question regarding a financial report, the technician asked whether she had received her refund and she responded affirmatively.

¹ AFDC is an example of so-called "cooperative federalism," i.e., joint Federal-state financial and administrative participation in a program designed to materially assist dependent children and their families. While the program is administered by state and county welfare departments, much of its financial support comes from the Federal government. It is axiomatic that state officials are bound by valid Federal statutes and regulations in administering the program. See, *Blue Earth County Welfare Dept. v. Cabellero*, Minn. 225 N. W. 2d 373 (1974); *Meagher v. Hennepin County Welfare Bd.* 300 Minn. 446, 221 N. W. 2d 140 (1974).

On April 1, 1974, appellant received her full April grant of \$275. On April 2, 1974, the Welfare Department suspended appellant's grant of \$275 for May 1974 and reduced her grant for June 1974 to \$265.50. This action was taken to recoup \$284.50 which the Welfare Department alleged was overpayment to appellant in March when she had received her full grant plus the income tax refunds. The \$284.50 figure (rather than the full refund of \$322.80) was apparently used because it represented income tax withheld from appellant's income in 1973 according to the Welfare Department's records.

Appellant challenged the suspension and reduction in an appeal to the Minnesota State Department of Public Welfare (hereafter State Department). On July 26, 1974, the commissioner of public welfare entered a revised order affirming the reduction, but reversing the suspension on the ground that state regulations permitted recoupment of only one-half of total monthly "disregarded income." Appellant challenged the commissioner's order in the district court, which affirmed the order on November 29, 1974. Pursuant to the commissioner's revised order, appellant's grants were reduced in amounts varying from \$55 to \$62 a month until \$284.50 had been recouped.

Appellant raises three issues on this appeal:

(1) Can public assistance be recouped from the recipient without specific Minnesota statutory authorization?

(2) Are tax refunds "income" under Federal regulations governing AFDC?

(3) Are Minnesota and Federal recoupment regulations consistent with the Social Security Act?

1. Appellant initially challenges the right of the Welfare Department or any public agency to recoup public assistance funds not fraudulently obtained without specific Minnesota statutory authorization. She relies chiefly on the following dictum in *Robertson v. Johnson*, 294 Minn. 201, 205, 200 N. W. 2d 316, 319 (1972):

"* * * Where there is no fraud exercised by the pauper in obtaining public assistance, only by express statutory authority can the pauper's assets be reached for reimbursement of such assistance. In re Settlement of Beaulieu, 264 Minn. 406, 119 N. W. 2d 25 (1963)." (Italics supplied.)

Beaulieu supported the above proposition only in dicta, but cited County of Brown v. Penkert, 164 Minn. 55, 204 N. W. 469 (1925), in which this court held that a decedent's estate was not liable for poor relief furnished to her in the absence of statutory authorization. The language in County of Brown, however, is narrower than that in the other cases. In County of Brown, we discussed the problem as follows:

"Caroline Dufek had a legal settlement in Brown county. She died testate on May 4, 1924. For 5 years prior to her death the county at her request furnished her aid by giving her grocery orders, and just prior to her death hospital care. This was furnished her as a poor person by the county commissioners in the ordinary way after investigation in discharge of the obligation imposed by statute. See G. S. 1923, § 3171; G. S. 1913, § 3081. The deceased had an equity in a 3-room cottage. This was known to the county. There was no mistake nor misrepresentation nor deception. There is no statute making a decedent or the estate of a decedent liable for poor aid furnished. It is given from a fund derived from taxation. The duty of furnishing it is imposed by law. It is in the nature of a charitable gift made a legal duty by the statute which embodies a sympathetic regard for the misfortunes of others. This is not a case where one, under no legal obligation, furnished relief, not intended as a gift. Under such circumstances, liability may arise upon the basis of a true contract implied in fact." (Italics supplied.) 164 Minn. 56, 204 N. W. 469.

We think the facts and administrative scheme here warrant disregard of the dicta in our prior cases based on the above quoted language in County of Brown. The appellant was overpaid in the instant case. She was not entitled to (nor was the Welfare Department legally obligated to provide her with) full grants in March and April when she had received and had available her tax refunds. Such an overpayment of government funds, which resulted at least in part from appellant's failure to report receipt of her refunds immediately, gives rise to an obligation to repay. As the New Jersey Supreme Court stated in facing a similar problem:

"* * * We are here dealing with overpayments of assistance, i.e., public money paid out in excess of that permitted by law. The mere receipt of such money can be said to create an obligation to repay, akin to the common law action in assumpsit for money had and received. In such a situation, it is unnecessary for the Legislature to specify that a welfare board has the right to recover this money. As heretofore noted, such right would be inherent in the board's functioning unless the Legislature provides otherwise." Redding v. Burlington County Welfare Bd. 65 N. J. 439, 445, 323 A. 2d 477, 480 (1974).

Moreover, the commissioner of public welfare is given broad statutory authority to regulate public assistance and comply with Federal regulations, including those asserted to justify recoupment in the instant case. Minn. St. 256.01, 256.011. We decline to interfere with what we perceive to be the commissioner's broad discretion to fairly administer public assistance.

2. Appellant argues that Department of Public Welfare Regulation INM III-3240.14, which treats tax refunds as "income" to be applied to current need, violates 45 CFR 233.20(a)(3)(ii)(c) of the Federal AFDC regulations promulgated by the Department of Health, Education, and Welfare (HEW). "INM" designates Income Maintenance Manual, a compilation of the State Department's policies and procedures for administration of the AFDC program. While we will use the term "regulation" to refer to the department's policy on income tax refunds, this regulation is not a "rule" within the meaning of Minn. St. 15.0411, subd. 3, of our Administrative Procedure Act, nor was it promulgated pursuant to administrative rulemaking procedures. It is merely a policy statement of the State Department. In *Wacha v. Kandiyohi County Welfare Bd.* ___ Minn. ___, ___ N. W. 2d ___, filed herewith, we held that this policy statement is not invalid as a violation of state rulemaking procedure.

The state regulation provides:

"Income tax refunds, at the time they are received, must be considered as income and must be applied to current need."

The applicable Federal regulation, provides in relevant part:

"* * * [i]n establishing financial eligibility and the amount of the assistance payment: (a) All income and resources, after policies governing the allowable reserve, disregard or setting aside of income and resources have been applied, will be considered in relation to the State's standard of assistance, and will first be applied to maintenance costs; * * * (c) only such net income as is actually available for current use on a regular basis will be considered, and only currently available resources will be considered; and (d) income and resources will be reasonably evaluated." (Italics supplied.)

Appellant argues that tax refunds are not available for current use "on a regular basis" and should therefore be considered personal property she is allowed to keep and not income.²

Several courts have considered this question and a split of authority has developed. We will discuss what we regard as the two significant cases.³ In *Kaisa v. Chang*, 396 F. Supp. 375, 377, note 13 (D. Hawaii 1975), the United States District Court said that an income tax refund was not available on a regular basis because of "the uncertainty of receiving any tax refund and the fact that even if received, it can be expected, at most, once annually." In *Walker v. Juras*, 518 P. 2d 663 (Ore. App. 1974), the Oregon Court of Appeals held that tax refunds were properly income. In *Walker* the court noted that refunds were available on

² Minnesota statutes and regulations accord certain "lump sum payments"—e.g., inheritances and insurance settlements—and "liquid assets"—such as savings, cash on hand, and certain investments—the status of personal property which a recipient and two children are allowed to possess up to a value of \$500 and still remain eligible for full benefits. Minn. St. 256.73, subd. 2(2); Minnesota Department of Public Welfare, AFDC Program Manual, IV-M-9-1 and IV-L-4.

³ Other cases include *Richards v. Lavine*, No. 104731, N. Y. Supreme Court, Broome County (1974) (refunds are deferred income available on a regular basis); *County of Alameda v. Carleson*, 5 Cal. 3d 730, 97 Cal. Rptr. 385, 488 P. 2d 953 (1971), appeal dismissed for want of a substantial Federal question, 406 U. S. 913, 92 S. Ct. 1762, 32 L. ed. 2d 112 (1972) (approving a California scheme differentiating between recurring and nonrecurring lump-sum payments). See, also, *Carr v. Saucier*, (N. D. Cal. 1973) No. 16,704 Civil (unreported decision) (one-time lump-sum social security benefit payment was not properly considered income available on a regular basis).

an annual basis and were distinguishable from other kinds of lump-sum payments (inheritances, gifts, insurance benefits, personal-injury damages, etc.) in that they were (1) attributable to the efforts of the recipient and (2) to some extent, within his control. The court quoted from an unpublished Federal district court opinion, Carr v. Saucier (N. D. Ga. 1973) No. 16,704 Civil, as follows:

"The common elements of lack of effort and control on the part of the recipient in these lump sum payments is lacking in the income tax refund. The refund is an annual payment of income earned and the wage earner has the ability to elect to receive a portion of his payment at the end of the tax period by varying the number of his claimed dependents. This power to control, to some degree, the existence and amount of the amount paid in cash in the scheduled pay period and the amount paid at the end of the tax period supports the division's treatment of the refund as regular income. By decreasing the number of claimed dependents below actual dependents a wage earner may decrease his net receipts. By this means he may qualify for ADC for 11 months of a year and receive his refund, even though his actual income takes him above the qualified standards." 518 P. 2d 665.

We prefer the result of the Oregon case. Black, Law Dictionary (Rev. 4 ed.), p. 1450, defines "regular" as: " * * * Steady or uniform in course, practice, or occurrence; not subject to unexplained or irrational variation." Income tax refunds are a reasonably predictable annual source of income. While they may be subject to some variations, for wage earners with low incomes and relatively stable economic circumstances (a characterization which we note describes most AFDC recipients) tax refunds are a sufficiently uniform source of income to be deemed available on a "regular" basis.⁴

This result comports more closely with the view taken by HEW, the agency charged with administration and regulation of

⁴ Among the elements of regularity in the income tax refund are the following: (1) The amount of tax withheld (and hence the amount of any refund) is determined from a prepared table based on gross income, number of dependents, and marital status; (2) the recipient most often calculates his own tax and is therefore aware of the amount of any refund before it arrives; (3) the refund is available on an annual basis at a time based in large part on when the recipient files his return.

AFDC on the Federal level. In an HEW Program Instruction to state agencies administering public assistance programs, HEW stated in part:

"Section 402(a)(7) of the Social Security Act [42 USCA, § 602(a)(7)] and Federal regulation 45 CFR 233.20 provide that a State agency shall take into consideration all income and resources, except as otherwise specified in the Act, in determining need and the amount of assistance under the public assistance titles. Regulation 45 CFR 233.20(a)(3)(ix) also provides that the availability of all potential sources of income shall be explored.

"In determining need and amount of assistance, the State agency may take into consideration the amount of earned income an applicant or recipient would receive if he claimed the maximum number of exemptions he is entitled to under the law or his actual earned income plus any income tax refund received, if the applicant or recipient does not claim the maximum number of exemptions." Department of Health, Education, and Welfare Social and Rehabilitation Service, Program Instruction APA-PI-74-15 (April 2, 1974).

In addition, HEW has deleted reference to the term "regular" in its revised income assessment regulations. The proposed provision, 45 CFR 233.20(a)(3)(ii)(d), provides as follows:

"[N]et income available for current use and currently available resources shall be considered; income and resources are considered available both when actually available and when the applicant or recipient has a legal interest in a liquidated sum and has the legal ability to make such sum available for support and maintenance." (Italics supplied.)

While we are informed that this regulation has not yet taken effect, the fact that the term "regular basis" has been deleted further evidences HEW's belief that all income, including tax refunds, must be applied to offset need. Although the Program Instruction and regulation change occurred after the initiation of administrative proceedings in the instant case, they provide persuasive evidence of HEW's views on this issue.⁵

⁵ Alternatively, income tax refunds might be considered "currently available resources" within the meaning of the Federal regulation. They are certainly "resources" within the ordinary meaning of that term and are available to meet need when received. This construction would comport with the general Federal AFDC policy that all income and resources be considered in grant calculation absent a specific policy to the contrary. *Shea v. Vialpando*, 416 U. S. 251, 253, 94 S. Ct. 1746, 1750, 40 L. ed. 2d 120, 125 (1974).

Finally, viewing income tax refunds as income comports more closely with the equitable and efficient operation of the AFDC program. As noted in Carr v. Saucier, (N. D. Ga. 1973) No. 16,704 Civil, cited in Walker v. Juras, supra, recipients would otherwise be encouraged to claim fewer deductions than they were legally entitled to in order to secure a larger, grant-determination-free refund. Federal and state treasuries thus become a protected savings account which may be withdrawn annually without an impact on the AFDC grant. Such a result would threaten the laudable goals and fiscal integrity of the AFDC program.⁶ We therefore hold that income tax refunds are net income actually available for current use on a regular basis within the meaning of 45 CFR 233.20(a)(3)(ii)(c) and may be considered income to be applied to current need in the AFDC structure.

3. Appellant challenges state and Federal regulations authorizing recoupment as inconsistent with the Social Security Act. Her challenge is two-pronged: (1) She argues that all recoupment through grant reduction is prohibited under the Social Security Act, 42 USCA, § 601, et seq.; and (2) she argues that Minnesota Department of Public Welfare regulations governing recoupment violated the "earned income disregard" provisions of 42 USCA, § 602(a)(7,8).

Appellant asserts that 45 CFR 233.20(a)(12), which, in essence, authorizes recoupment from AFDC grants in certain instances, is invalid. That regulation provides in relevant part:

(a) Requirements for State plans. * * *

* * * * *

"(12) Recoupment of overpayments and correction of underpayments. Specify uniform Statewide policies for:

⁶ This problem was obviously a concern of HEW in the drafting of the proposed regulation, 45 CFR 233.20(a)(3)(ii)(d). Under that regulation, a recipient claiming fewer deductions than he was permitted would nonetheless be credited with the receipt of income assuming the proper number of deductions.

"(1) Recoupment of overpayments of assistance, including certain overpayments resulting from assistance paid pending hearing decisions.

"(A) The State may not recoup any overpayment previously made to a recipient:

"(1) Unless the recipient has income or resources exclusive of the current assistance payment currently available in the amount by which the agency proposes to reduce payments: except that,

"(2) Where such overpayments were occasioned or caused by the recipient's willful withholding of information concerning his income, resources or other circumstances which may affect the amount of payment, the State may recoup prior overpayments from current assistance grants irrespective of current income or resources.

"(B) Withholding of information which is subject to the provisions of paragraph (a)(12)(1)(A)(2) of this section includes the following:

"(1) Willful misstatements (either oral or written) made by a recipient in response to oral or written questions from the State agency concerning the recipient's income, resources or other circumstances which may affect the amount of payment. Such misstatements may include understatements of amounts of income or resources and omission of an entire category of income or resources;

"(2) A willful failure by the recipient to report changes in income, resources or other circumstances which may affect the amount of payment, if the State agency has clearly notified the recipient of an obligation to report such changes. The recipient shall be given such notification periodically at times (not less frequently than semi-annually) and by methods which the State agency determines will effectively bring such reporting requirements to the recipient's attention."

The essence of appellant's argument is that Congress, which has authorized recoupment for other kinds of public assistance,⁷ but specifically rejected it for AFDC, intends that AFDC benefits should be restricted only because of lack of need or dependency.⁸

⁷ In 1972 Congress added recoupment provisions to the Supplemental Security Income Program, which combines and overhauls former programs for the aged, blind, and elderly. 42 USCA, § 1383(b).

⁸ Appellant argues that Congress therefore acquiesced in the decision in *Bradford v. Juras*, 331 F. Supp. 167 (D. Ore. 1971) (three-judge court) that overpayments may not be recouped by reducing current AFDC payments. Congress was aware of the *Bradford* decision when it considered and rejected mandatory recoupment. See S. Rep. No. 92-1230, Report on H. R. 1, 92nd Cong. 2nd Sess. (1972), p. 476.

Appellant concludes that the Federal regulation authorizing recoupment is not a need or dependency regulation and is therefore invalid. After careful consideration and review of the authorities cited by appellant, we reject this argument for the reasons that follow.

First, the legislative history of the Social Security Act and the Federal district court cases cited by appellant do not provide persuasive support for her argument. While Congress has not passed proposed legislation authorizing mandatory recoupment by state agencies in the AFDC program, neither has it prohibited recoupment or made any effort to invalidate the Federal regulation at issue here. Thus, Congressional "intent" in this area is uncertain. Under these circumstances, we decline to engage in speculation about it and prefer to uphold the regulation.

Likewise, United States Supreme Court cases provide little assistance. While the Supreme Court has held that state agencies may not, in considering the income and resources available to a recipient in fixing a grant, consider income or resources that are not "in fact" available to a recipient for current use on a regular basis,⁹ it has also accorded those agencies substantial discretion in making need and benefit determinations consistent with local policies and socioeconomic value judgments.¹⁰

Second, contrary to appellant's assertion, lower Federal court cases which have faced recoupment issues similar to the one at bar are either distinguishable on their own facts or support the validity of the Federal regulations before them. The

⁹ Van Lare v. Hurley, 421 U. S. 338, 95 S. Ct. 1741, 44 L. ed. 2d 208 (1975); Lewis v. Martin, 397 U. S. 552, 90 S. Ct. 1232, 25 L. ed. 2d 561 (1970); King v. Smith, 392 U. S. 309, 88 S. Ct. 2128, 20 L. ed. 2d 1118 (1968).

¹⁰ New York State Dept. of Social Services v. Dublino, 413 U. S. 405, 93 S. Ct. 2507, 37 L. ed. 2d 686 (1973); Wyman v. James, 400 U. S. 309, 91 S. Ct. 381, 27 L. ed. 2d 408 (1971); Dandridge v. Williams, 397 U. S. 471, 90 S. Ct. 1153, 25 L. ed. 2d 491 (1970); Charleston v. Wohlgenuth, 332 F. Supp. 1175 (E. D. Pa. 1971), affirmed, 405 U. S. 970, 92 S. Ct. 1204, 31 L. ed. 2d 246 (1972); Snell v. Wyman, 281 F. Supp. 853 (S. D. N. Y. 1968), affirmed, 393 U. S. 323, 89 S. Ct. 553, 21 L. ed. 2d 511 (1969).

United States District Court for the District of Columbia held a predecessor of the current Federal recoupment regulation invalid because it purported to authorize recoupment from current assistance payments without regard to need. That court commented:

"In permitting the recoupment of 'any overpayment' even though it may come only from a reduction in 'current assistance payments,' the regulation before us clearly authorizes a change in the recipient's monthly payment, even though his financial circumstances, apart from the overpayment, have not changed. In so doing, the regulation requires the states to presume conclusively that the overpayment is currently available even though it may have long ago been spent. The recoupment regulation therefore violates in fact availability of income and resources because it presumes income is available when this may not in fact be so. The Court finds no distinction between the presumptions struck down in *King v. Smith*, supra, and *Lewis v. Martin*, supra, and the presumption of availability embodied in AFDC's recoupment regulation. King invalidated a presumption that a man in the house will make income available to a child who is not his own. Martin likewise upset a presumption that the income of a non-adoptive stepfather is available to children to whom he owes no legal duty of support. The recoupment regulation here at issue similarly presumes income or resources are available when they may not in fact be available. We therefore hold that the regulation at issue is inconsistent with the Social Security Act of 1935 as amended." (Italics supplied.) *National Welfare Rights Organization v. Weinberger*, 377 F. Supp. 861, 868, (D. D. C. 1974).

In a similar vein, appellant argues here that she spent the tax refunds almost immediately and that they were not available to meet her needs or those of her children in May 1974 or thereafter, when recoupment was accomplished. Appellant ignores several factors which distinguish her case from *National Welfare Rights Organization v. Weinberger*, supra: (1) The reason recoupment could not be accomplished until May 1974 was that appellant did not promptly report receipt of her tax refunds, and the Welfare Department did not learn of their receipt until after the April grant had been paid; (2) regardless of when and how appellant actually disposed of her tax refunds, those refunds were available to her to meet needs that would otherwise have been met by the AFDC grant; and (3) recoupment did not invade established minimum grant levels of need, but only appellant's earned income beyond those levels.

The last factor noted distinguishes appellant's case from

all of the cases she cites. As noted in the statement of facts, recoupment from appellant's grant was accomplished at the rate of one-half her "earned income disregard," or approximately \$55 per month. The recoupment arose from outside income earned by appellant. At no time did the appellant's grant plus her other available income fall below the minimum standards of need set for herself and her two children under the AFDC program. The court in *National Welfare Rights Organization v. Weinberger*, *supra*, seemed to acknowledge the possibility of valid recoupment in this situation in the statement of the issue in that case:

"* * * What is at issue here is the power of the states to reduce current assistance payments to welfare recipients concededly eligible for such payments under state and federal law, for the purpose of recouping overpayments made to such recipients by state or local welfare departments, without regard to the effect of such recoupment on their ability to purchase items of daily need." (Italics supplied.) 377 F. Supp. 865.

This factor also distinguishes the case of *Cooper v. Laupheimer*, 316 F. Supp. 264 (E. D. Pa. 1970), relied on by appellant, which invalidated a Pennsylvania recoupment regulation. In that case, decided by a three-judge panel, the court observed:

"* * * The regulation arbitrarily directs that the duplicate payment must be recovered by proportionate reduction in two or four consecutive payments, regardless of how little remains to satisfy the family's needs." (Italics supplied.) 316 F. Supp. 267.

One other Federal case is worthy of consideration in connection with the third factor. In *Holloway v. Parham*, 340 F. Supp. 336, 343 (N. D. Ga. 1972), the three-judge court saved a Georgia recoupment statute by carefully construing it so any recoupment would not invade established need:

"Since this construction of Ga. Code Ann. § 99-2912(b) requires the Director to waive repayment if there is need, it does not allow restitution from needy dependent children for the misconduct of their parents. Thus, Ga. Code Ann. § 99-2912(b) is consistent with the provisions of the Social Security Act [42 U.S.C. § 602(a) (10)] and HEW regulations [45 C.F.R. 233.20(a) (3) (ii) (d)]."

The court remanded the case with instructions to waive recoupment unless there had been a change in "need":

"The record clearly indicates that defendant made no such showing and that the defendant's hearing officer

did not make any determination as to a change in the 'need' of plaintiff and her children. Therefore, this court finds that defendant invalidly applied Ga. Code Ann. § 99-2912(b) to plaintiff and her children. Accordingly, the case is remanded to defendant with the instruction that absent a finding that there has been a change in 'need' of plaintiff and her children, defendant is to waive repayment." 340 F. Supp. 344.

Since the Minnesota scheme of recoupment is careful to leave in the hands of the recipient more than sufficient income to meet minimum levels of need established under the AFDC program, we uphold it as consistent with the relevant Federal authorities discussed above.¹¹

Third, we cannot agree with appellant's assertion that because she had spent her refunds on necessities before recoupment, the Welfare Department may not reduce her subsequent grants to compensate for her use of those refunds. Our acceptance of such an assertion would require the Welfare Department to catch recipients with funds "in hand" at the time their monthly grants were paid in order to ensure that the funds had not been spent before recoupment was begun. This is an obvious administrative impossibility. If it became a requirement, practically no available income could be considered in determining the grant. The essence of appellant's situation is this: She was entitled to receive a \$275-a-month grant based on a formula which considered need and income. Whether she actually spent the grant in a day or in 30 days, her grant remained \$275 a month. When she received her income tax refunds, she received income sufficient to replace over one month's grant at the \$275-a-month rate. Again, whether she spent her refunds in a day, a month, or two months, they were available to her to meet the equivalent

¹¹ Any consideration we would give to the decision in *Bradford v. Juras*, 331 F. Supp. 167, 169 (D. Ore. 1971) (three-judge court), relied on by appellant, is markedly diminished by that court's obvious error in determining that the "earned income disregard" is not mandatory. 42 USCA, § 602(a) (7,8). See, *X v. McCorkle*, 333 F. Supp. 1109 (D. N. J. 1970) affirmed per curiam sub nom. *Engelman v. Amos*, 404 U. S. 23, 92 S. Ct. 181, 30 L. ed. 2d 143 (1971).

of over one month's grant, and she could have so treated them in budgeting. The AFDC program is not designed to provide funds to cover all expenses a recipient might reasonably spend on "necessary" items. It is designed to provide funds to meet minimum established levels of need for large numbers of families. It can do so fairly, equitably, and efficiently only if availability of income is presumed for the same period and in the same manner as the availability of the grant itself would be presumed.

Appellant's most troublesome argument is that Minnesota Department of Welfare Regulations IMM IV-1291¹² violates 42 USCA, § 602(a) (7,8), which requires the state agency to disregard a certain portion of appellant's income in determining "need" as a work incentive.

42 USCA, § 602, provides in relevant part as follows:

"(a) A State plan for aid and services to needy families with children must

"(7) except as may be otherwise provided in clause (3), provide that the State agency shall, in determining need, take into consideration any other income and resources of any child or relative claiming aid to families with dependent children, or of any other individual (living in the same home as such child and relative) whose needs the State determines should be considered in determining the need of the child or relative claiming such aid, as well as any expenses reasonably attributable to the earning of any such income; (8) provide that, in making the determination under clause (7), the State agency—

(A) shall with respect to any month disregard—

(1) all of the earned income of each dependent child receiving aid to families with dependent children who is (as determined by the State in accordance with standards prescribed by the Secretary) a full-time student or part-time student who is not a

¹² IMM IV-1291 reads in relevant part: "Recoupment of overpayments may be made only in a case in which the recipient has disregarded income, and the amount recovered each month shall not exceed one-half of the total monthly disregarded income.

"Recoupment of overpayments is obtained by withholding the determined amount from each monthly assistance check until the total overpayment has been recovered or until the recipient is no longer eligible for assistance, whichever occurs first."

full-time employee attending a school, college, or university, or a course of vocational or technical training designed to fit him for gainful employment, and

(11) In the case of earned income of a dependent child not included under clause (1), a relative receiving such aid, and any other individual (living in the same home as such relative and child) whose needs are taken into account in making such determination, the first \$30 of the total of such earned income for such month plus one-third of the remainder of such income for such month (except that the provisions of this clause (11) shall not apply to earned income derived from participation on a project maintained under the programs established by section 632 (b)(2) and (3) of this title)."

Clause (8) and the statutory scheme in which it operates contemplates the following formula for calculation of an AFDC grant:

$$\text{Grant} = \text{Minimum Need Level (MNL)} - [\text{Net Income (NI)} - \text{Earned Income Disregard (EID)}]$$

The operation of clause (8) can be illustrated as follows. Assume that the state agency's minimum need level (ascertained by other state and Federal statutes and regulations not relevant here) for a family of two children is \$300 a month. Assume further that the recipient and head of this family has monthly income of \$270. The monthly AFDC grant would be calculated in this way:

$$\text{Grant} = \$300 (\text{MNL}) - [\$270 (\text{NI}) - \$110 (\text{EID})] = \$140 \text{ a month}$$

The "earned income disregard" in this example is the first \$30 of income plus 1/3 of the amount of monthly income remaining (i.e., 1/3 of \$240), or \$110.

At the outset, we note that the state must disregard the income referred to in clause (8). In *X v. McCorkle*, 333 F. Supp. 1109 (D. N. J. 1970), affirmed per curiam sub nom. *Engelman v. Amos*, 404 U. S. 23, 92 S. Ct. 181, 30 L. ed. 2d 143 (1971), a three-judge court held that New Jersey regulations which fixed an "administrative ceiling" on income for purposes of AFDC eligibility, but did not disregard the income referred to in clause (8), were invalid. The court commented as follows on the history and policy of clause (8):

"Section 402(a) (8) [42 USCA, § 602(a)(3)] stipulates that certain amounts of earned income shall be

disregarded when a state, as it must in accordance with § 402(a) (7) [42 USCA, § 602(a)(7)], considers the 'other income and resources' of an applicant in order to determine need. This provision was intended as an incentive to welfare recipients to seek employment. It was part of a congressional effort made to ensure that an applicant not find it more advantageous to remain on welfare than to seek employment. The legislative history reveals a concern among the Congressmen that one of the stated goals of the program—to help such parents or relatives to attain or retain capability for the maximum self-support and personal independence consistent with the maintenance of continuing parental care—was not being achieved.

"The Senate Finance Committee stated that disregarding some portion of earned income was essential to implement this objective. The Committee in its report explained: 'A key element in any program for work and training for assistance recipients is an incentive for people to take employment. If all the earnings of a needy person are deducted from his assistance payment, he has no gain for his effort. Currently, there is no provision in the Social Security Act under which States may permit an employed parent or other relative under the AFDC program to retain some of his earnings. There is no doubt, in the opinion of the committee, that the number of recipients who seek and obtain employment will be greatly increased if, in conjunction with the work incentive program, there may be added to title IV some specific earnings incentives for adults to work. The Department of Health, Education and Welfare has informed the committee that research and demonstration projects have illustrated that more recipients will go to work when an incentive exists.'

"The report continued to state that, 'the committee believes that this provision will furnish incentives for members of public assistance families to take employment and, in many cases, increase their earnings to the point where they become self-supporting.' 333 F. Supp. 1116.

The court rejected New Jersey's arguments that its scheme substantially complied with clause (8) and provided sufficient work incentives:

"The legislative history reveals the general purpose of section 402(a) (8) [42 USCA, § 602 (a)(8)], and the language of the section is quite specific. It denominates an amount, \$30, and a proportion, one-third of the individual's earned income, which must be disregarded before determining need.

"If Congress were willing to allow states to devise methods of encouraging employment by developing their own formulae, the statute could have been so written. As it exists today, however, it is a particular directive mandating that states follow a specified formula. No other scheme would comply with the statute." 333 F. Supp. 1117.

The revised order of the Minnesota commissioner of public welfare authorized recoupment of one-half of appellant's "earned income disregard" per month. Thus, it would initially appear that appellant is correct in her contention that the commissioner is not disregarding the full amount of income required by clause (8). However, clause (8) refers to disregarding income "in making the determination under clause (7)." Clause (7), in turn, refers to taking into consideration income and resources "in determining need." The issue therefore becomes whether the recoupment process carried out in the instant case was a determination of need.

The United States District Court for the District of Minnesota, speaking through Judge Earl Larson, has recently considered this issue of first impression in *Johnson v. Likins* (D. Minn. 1975) No. 4-75-318 Civil. Judge Larson issued a preliminary injunction prohibiting the Minnesota Department of Public Welfare recouping overpayments caused solely by agency error from disregarded income. In issuing the injunction, the court held that the Minnesota recoupment regulation involved a determination of need and violated the mandate of § 602(a)(8):

"* * * Need determination is so inherent in the regulation that [Minnesota] DPW has been unable to argue the validity of that regulation without becoming deeply enmeshed in considering the needs of AFDC recipients and in considering the income and resources of such recipients in relation to their needs. When a State concerns itself with the need of AFDC recipients, it must pay heed to Federal work incentive policies as well."

Judge Larson further concluded that Federal regulations did not authorize the kind of recoupment accomplished in *Johnson*, since "income or resources exclusive of the current assistance payment currently available" in 45 CFR 233.20(a)(12)(1)(A)(1) did not include clause (8) disregarded income.

The instant case is distinguishable from *Johnson* since the conduct of the recipient, and not the error of the agency, was the cause of the overpayment. While the Welfare Department

has not alleged fraud on the part of this recipient, the administrative hearing record discloses the following uncontradicted testimony of appellant herself:

"[Mr. McGreevy, advocate for the county welfare department]: Mrs. Steere then you received them [income tax refunds] on March 24 and March 26, is that right?

"[Mrs. Steere]: Uh huh.

"[Mr. McGreevy]: And when did you report it to the agency?

"[Mrs. Steere]: That I received this you mean, that I * * *

"[Mr. McGreevy]: Yah

"[Mrs. Steere]: When I received it or when I spent it?

"[Mr. McGreevy]: When you received it, the income tax refunds?

"[Mrs. Steere]: I never did call in and report it. I sent in my forms and I thought that was all the reporting I needed to do.

"[Mr. Janus, appellant's counsel]: I believe you testified that you called her up in April and told her you got it.

"[Mrs. Steere]: Yah, I asked her a question on my financial report and she asked me if I had received my income tax returns and I said yes.

* * * * *

"[The referee]: * * * Mrs. Steere do you recall whether or not your January warrant, you did receive an enclosure of some type?

"[Mrs. Steere]: A card * * *

"[The referee]: Do you recall basically what it said?

"[Mrs. Steere]: Pretty much what she went over [an eligibility technician had previously testified as to the content of the card as set forth supra], informing us that you would have to report it as income * * * it would be considered income, but I had no idea of this other.

"[The referee]: Of this other what?

"[Mrs. Steere]: Of paying it back or not being allowed to have it." (Italics supplied.)

The referee, in holding for the county, stated:

"We do find that the petitioner is attempting a circuitous route of bypassing responsibility for accounting for her income tax refund. The issue is not 'overpayment'; it is accountability for income received."

The commissioner upheld this finding in a revised order, and an experienced district court judge approved it, noting:

"While there may be no allegation of fraud, certainly appellant was mistaken in not notifying the county at the time she received her income tax refund as she had been requested to do."¹³

Our examination of the relevant regulations and statutes convinces us that recoupment is not a "determination of need" within the meaning of 42 USCA, § 602(a)(7,8). While the recoupment process may consider "need," in the ordinary meaning of that word, in order to avoid cutting into the minimum grant level for a particular family, it does not determine need within the meaning of the Social Security Act. The process of determining need for assistance, which is completely separate from the recoupment process, includes the steps set forth in the hypothetical example discussed earlier: (1) Setting a basic grant level for a family of a particular size; and (2) deducting currently available income and resources from that level. When that process takes place, \$30 plus 1/3 of the remainder of any net income must be disregarded under the Act. It is uncontroverted that the Welfare Department does routinely disregard that income, and that it did so in this case.

¹³ Under the circumstances, the county might have sought a specific finding that the overpayment was caused by "willful failure of the recipient to report changes in income, resources or other circumstances which may affect the amount of payment" within the meaning of 45 CFR 233.20(a)(12)(1)(3)(2). Appellant admitted knowledge of her obligation to report her tax refunds, but she did not do so until after she had received her full April grant and then only in response to a specific inquiry. Despite the clear and specific notice to report receipt of the refunds immediately, she failed to comply. Since recoupment in cases of willful conduct is plainly allowed by Federal regulations from the assistance payment itself, appellant's argument on disregards would fail if a finding of willful conduct has been made. 45 CFR 233.20(a)(12)(1)(A)(2). However, we proceed on the record and findings before us.

Appellant maintains, however, that such income must continue to be disregarded throughout the recoupment process as well, since that process also determines need. We disagree. The recoupment process corrects prior overpayment, it does not determine need. The fact that the recoupment process takes care that recoupment not invade a family's basic grant level as established in the need-determination process does not mean that recoupment is a redetermination of need. It means, at most, that the recoupment process recognizes and utilizes need as already established by the former process.

The recoupment regulations at issue here allow recoupment from "income or resources exclusive of the current assistance payment currently available in the amount by which the agency proposes to reduce payments." 45 CFR 233.20(a)(12)(1)(A)(1), (Italics supplied.) Earned income from employment, such as appellant's here, is exclusive of her payment (i.e., it comes from her employer, not AFDC) and is currently available to her. Therefore, prior overpayments may be recouped from that earned income. Since the Minnesota regulations recoup only one-half of the amount of that income that had been previously disregarded in the need-determination process, they clearly fall within the limits permitted by Federal regulations.¹⁴ Furthermore, in response to appellant's argument that the work-incentive policy of the Social Security Act is violated, we note that the Minnesota regulations allow appellant to retain one-half of her disregarded income, and that retention constitutes an incentive to her to keep her job and continue earning income.

Acceptance of appellant's argument would virtually eliminate recoupment except in cases of fraud. While a negligible number of recipients might receive windfalls and be caught with those

¹⁴ We do not deem the fact that recoupment is accomplished through ultimate grant reduction to be of legal significance. That Minnesota welfare authorities choose to recoup by reducing the grant rather than through a civil lawsuit or other more cumbersome means is a matter of administrative convenience and discretion, not legal right.

funds in hand, we doubt that the vast majority of recipients have any additional income or resources available to them other than earned income. If the disregarded portion of that earned income could not be touched, and the remainder were deducted from the grant in any event, there would be no practical way to recoup overpayments. Such a situation would disturb the fiscal integrity of AFDC and would give overpaid recipients an unfair windfall when compared with other recipients.

Our views on this problem are shared by HEW. In a memorandum on behalf of the United States as amicus curiae filed in the case of Johnson v. Likins, supra, after Judge Larson's issuance of the preliminary injunction, HEW takes the position that recoupment from disregarded income of overpayments caused by agency error is permissible under the Social Security Act and the regulations discussed herein. In commenting on the plaintiff's contentions and Judge Larson's memorandum in Johnson, HEW states:

"* * * Plaintiffs' view is incorrect since the disregarded income is in fact actually available income to the recipient in the amount of the proposed reduction in the assistance payment. It is the existence of the disregarded income which distinguishes this factual situation from that in N.W.R.O. v. Weinberger, [377 F. Supp. 861 (D. D. C. 1974)]. (In N.W.R.O. v. Weinberger, the only money available for recoupment was from the welfare grant itself and thus the Court focused upon the assumption of income rule regarding whether the overpayment was still available to the recipient.)

"Although plaintiffs are correct in stating that the disregarded income is to be ignored in determining the family's need, the crucial focus should be upon the words 'determining need' rather than on the word 'disregard.' Indeed the Court has so recognized. * * * Under H.E.W.'s recoupment regulations, the income which is encompassed by the disregard is not counted toward the determination of a family's need or the amount of assistance payment at that point when this determination occurs. * * * Plaintiffs mistakenly conclude that because such funds cannot be counted at the point when the need is determined, these funds may also not be considered available for recoupment. There are a few income disregards for which plaintiffs' conclusion would be correct * * *. Congress, in these exceptional instances, employed language which clearly precludes recoupment but did not use similar language in § 402(a)(8)(A)(ii)."

In commenting on the redetermination-of-need argument used in

Johnson and in the instant case, HEW states:

"Since the state can recoup the amount of money it proposes to recoup only because of the existence of the disregarded funds, where no other source for recoupment is available it might be argued that reducing the payment by deducting the recoupment constitutes a redetermination of the amount of the assistance grant. HEW does not accept this interpretation. The choice to take the recoupment from the assistance payment (when there are available disregarded funds in an equal amount) is considered one of administrative convenience on the part of the state. Essential to this analysis is an understanding of the concept of 'currently available income and resources.' Income which is earned during the course of the month in question is considered to have been currently available during the course of that month. Indeed, this must be the case, for to conclude that the income is currently available on a day when the computation of the monthly grant is made only if the recipients physically possess it on that day, would make the computation of need impossible; a recipient could spend the funds before the date of the computation and then claim that he has no income currently available. Thus for the state to deduct the amount of the recoupment from the benefit check does not constitute a reduction in the amount of the grant. The income received which had been disregarded for purposes of determining the grant is available to the recipient in lieu of the amount recouped from the grant check to meet the need standard or portion thereof which the state has undertaken to provide. No recomputation of the grant is involved, since the figure which was ascertained in the determination of need remains constant and the recoupment is substantively taken from the other available income which was never used to reduce the grant. Recoupment from the disregarded income therefore, would not leave the recipient with less income than the need standard or the percentage thereof which the State has decided to provide."

As we interpret the HEW position, that agency would regard the recoupment in the instant case as consistent with its regulations and the Social Security Act. The views of HEW on the construction of statutes and regulations it administers are entitled to great weight. *New York State Dept. of Social Services v. Dublino*, 413 U. S. 405, 93 S. Ct. 2507, 37 L. ed. 2d 688 (1973). See, also, *N. L. R. B. v. Boeing Co.* 412 U. S. 67, 93 S. Ct. 1952, 36 L. ed. 2d 752 (1973); *United States v. Jackson*, 280 U. S. 183, 50 S. Ct. 143, 74 L. ed. 361 (1930). Therefore, we hold that the recoupment process undertaken in the instant case was not a "determination of need" within the meaning

of clause (7), and the Welfare Department could recoup from earned disregarded income.¹⁵ See, *McGraw v. Berger* (S. D. N. Y. February 25, 1976) 75 CIVL 4682 (unreported decision by Conner, J.) (upholding New York's method of recouping overpayments in the face of a § 602(a)(3) challenge).

We emphasize that this decision is based upon the particular facts of the instant case and the statutes and regulations relevant thereto. We offer no opinion regarding the effect of changes in state or Federal regulations subsequent to this case nor any opinion on the merits of the case before Judge Larson or his arguments. We leave to future cases the ultimate resolution of these matters.

We have also considered appellant's final contention regarding calculation of the recoupment, and we find it to be without merit.¹⁶ Since the recoupment in the instant case was in all

¹⁵ In response to HEW's memorandum, appellant relies heavily on *X v. McCorkle*, 333 F. Supp. 1109 (D. N. J. 1970) affirmed per curiam sub nom. *Engelman v. Amos*, 404 U. S. 23, 92 S. Ct. 181, 30 L. ed. 2d 143 (1971). That case involved a New Jersey regulation which denied AFDC benefits to the extent that a family's "available adjusted income," calculated without deduction for the "statutory disregards" specified by § 402(a)(3) of the Social Security Act, 42 USC, § 602(a)(3), exceeded an administrative ceiling figure set by the state. 333 F. Supp. 1113. The three-judge district court there emphasized that New Jersey did not deduct any disregarded income of any employed person in determining eligibility or in calculating the amount of the grant. Instead, it substituted its own administrative ceiling in the need-determination process. Under these circumstances the district court found that the New Jersey scheme violated clause (3), and the United States Supreme Court affirmed.

The instant case is clearly distinguishable from *McCorkle*. Minnesota does deduct the full amount of disregarded income in determining eligibility and calculating the amount of the grant. It does not do so in the recoupment process because that process recovers overpayment and does not determine eligibility or need. Minnesota had already provided appellant with a larger grant than she was entitled to; it did not attempt to shortcircuit Federal standards to provide a smaller grant as did New Jersey.

¹⁶ Appellant argues that the Welfare Department may recoup no more than \$275, the amount of her monthly grant, because she could have voluntarily terminated her assistance when she received the refund and reapplied for the full grant the following month. This argument lacks merit. First, she did not terminate her grant. Second, as the trial court noted: " * * * However, if the county had been notified of the payment, appellant would have been required to budget the refund and any amount above and beyond that required for a single month would be budgeted for subsequent months."

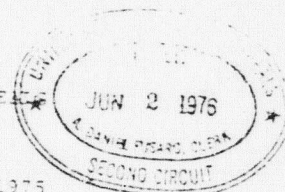
respects proper, the order must be affirmed.

Affirmed.

(footnote 16 continued)

We see no reason why the Welfare Department may not recoup what it has determined to be the full amount of the overpayment under the state and Federal regulations discussed herein.

UNITED STATES COURT OF APPEALS
For the Second Circuit
No. 971 - September Term 1975



Argued April 7, 1976

Decided June 2, 1976

Docket No. 76-7101

CYNTHIA HAGANS, for herself and her two infant children, KIMBERLY and KOREY; BERTHA GRISSETT, for herself and her five infant children, DEBORAH, ANGELO, WILLIAM, LANDA and CYNTHIA; KATHLEEN LIVERSTENIE, for herself and her infant child, DANA LYNN; KAREN HORNECK, for herself and her infant child, TODD, and her intrauterine child yet unnamed; EUPLEEN CARSON, for herself and her two infant children, TIMOTHY and CALVIN; BARBARA SIEMILLER, ELIZABETH SLY and BARBARA LYNCH, as individuals and on behalf of all other persons similarly situated,

Plaintiffs-Appellees,

FRANCES VAN BUREN, for herself and her two infant children; ANNIE MAE HAYES, for herself and her three infant children; SHIRLEY HARRIS, for herself and her infant child; ROSETTA CUMMINGS, for herself and her infant daughter; SERAHDINE CUOMO, for herself and her five infant children; ELLEN JOHNSON, for herself and her two infant children; CONNIE HARVEY, for herself and her infant child; GILDA MICHAELS, for herself and her infant child, and on behalf of all other persons similarly situated,

Intervenor-Appellees,

-against-

STEPHEN BERGER, as Commissioner of the New York State Department of Social Services,

Defendant-Appellant.

Before FRIENDLY, MANFIELD and MULLIGAN, Circuit Judges.

Appeal from a judgment of the United States District Court for the Eastern District of New York, Hon. Jacob Mishler, Chief Judge, holding 18 N.Y.C.R.R. § 332.7(a)(7) violative of 42 U.S.C. §§ 602(a)(7), (13), and enjoining its enforcement.

Reversed.

CARL F. MATTHEWSON, Nassau County Law Services Committee, Inc., Hempstead, New York, for Plaintiffs-Appellees and Intervenor-Appellees.

THESS J. FINE, Asst. Attorney General, Louis J. Lefkowitz, Attorney General, State of New York, Samuel S. Hirschowitz, First Asst. Attorney General, of Counsel, for Defendant-Appellant.

65-

1 MULLIGAN, Circuit Judge:

2 On February 10, 1972, the plaintiffs, on behalf of
3 themselves and their infant children and as representatives
4 of those who are recipients of public assistance in the State
5 of New York under the cooperative federal-state Aid to
6 Families with Dependent Children Program (AFDC) (42 U.S.C.
7 § 601 et seq.), commenced this action in the United States
8 District Court for the Eastern District of New York against
9 George K. Wyman, then Commissioner of the New York State
10 Department of Social Services (the State). The complaint
11 sought declaratory and injunctive relief in an action chal-
12 lenging the constitutionality under the equal protection
13 clause of what is now § 352.7(g) (7) of Title 18 of the New
14 York Code of Rules and Regulations (the Regulation), which
15 permits the State to make advance allowances of rent to prevent
16 the eviction of recipient families and to recoup them from
17 subsequent grants and allowances. The complaint also urged
18 that the State Regulation was contrary to the provisions of
19 the Social Security Act governing AFDC (42 U.S.C. §§ 602(a) (7),
20 (10)) (the Act), as well as the regulations of the Department
21 of Health, Education and Welfare (HEW) promulgated thereunder
22 (45 C.F.R. § 233.20(a)). The protracted and tortuous history
23 of this litigation is found in a chronological reading of
24 our opinions in 462 F.2d 938 (1972) and 471 F.2d 347 (1973),
25 the Supreme Court opinion in Hagans v. Lavine, 415 U.S. 528
26 (1974), and finally our opinion remanding the matter once
27 again to the district court, 517 F.2d 1131 (1975). We see
28 no need to repeat that narration. Chief Judge Mishler for the
29 fourth time has held that the Regulation is contrary both to
30 the Act and the HEW regulation. The judgment of the district
31 court of February 26, 1976 granted the plaintiffs' motion for
32

1 leave to intervene twenty-four additional named plaintiffs who
2 are AFDC recipients under the Regulation in its amended form.
3 The Regulation was declared void and its enforcement and
4 implementation were enjoined. No opinion was written, and a
5 stay was granted pending this appeal. Chief Judge Mishler's
6 previous opinion is set forth in 399 F. Supp. 421 (E.D.N.Y.
7 1973). The defendant has appealed. We reverse and remand
8 for the convocation of a three-judge court on the constitu-
9 tional issues involved. See 416 U.S. at 544.

10
11 I

12 The AFDC program was established by the Social Security
13 Act of 1935. It is financed largely by the federal government
14 on a matching fund basis and is administered by the states
15 which elect to participate. Those states are required to
16 submit an AFDC plan for the approval of the Secretary of HEW.
17 King v. Smith, 392 U.S. 309, 316-17 (1968). In determining
18 what AFDC benefits will be paid, the states must establish a
19 "standard of need," which determines who is eligible for
20 public assistance, and then must determine a "level of
21 benefits," that is, a percentage or maximum dollar amount of
22 such needs which will be paid. The states are given a "great
23 deal of discretion" in determining both of these criteria,
24 Rosado v. Wyman, 397 U.S. 397, 403 (1970). New York State
25 is one of only fourteen states which have set the level of
26 benefits at 100% of the established standard of need, and in
27 1974 increased the standard of need by 11%. Baumes v. Lavine,
28 N.Y. 2d 236, 379 N.Y.S. 2d 760, 765, 767 (1975). General
29 supervision of the New York AFDC program is the responsibility
30 of the Department of Social Services, with day-to-day admin-
31 istration performed by local or county agencies. Section
32 131-a(2) of the New York Social Services Law enumerates the

1 items to be included in determining the standard of need; in
2 addition to monthly sums determined by family size, allow-
3 ances for shelter are also provided.

4 As this litigation establishes, innumerable recipients
5 diverted shelter allowances to other purposes and became
6 delinquent in rental payments. Evictions ensued and place-
7 ment of AFDC recipients in so-called "welfare hotels" in
8 metropolitan areas became necessary. In an effort to prevent
9 this dislocation to generally unsuitable environs, the New
10 York State Department of Social Services provided for the making
11 of an "advance allowance" to recipients to prevent eviction.
12 The applicable Regulation is 18 N.Y.C.R.R. § 352.7(g) (7)
13 which provides:

14 For a recipient of public assistance who is being
15 evicted for nonpayment of rent for which a grant has
16 been previously issued, an advance allowance may be
17 provided upon request to prevent eviction or to
18 rehouse the family. Such an allowance may be pro-
19 vided only where the recipient has made a request in
20 writing for such an allowance, and has also requested
21 in writing that his grant be reduced in equal amounts
22 over the next six months to repay the amount of the
23 advance allowance. When there is a rent advance for
24 more than one month, or more than one rent advance in
25 a 12-month period, subsequent grants for rent shall
26 be provided as restricted payments in accordance with
27 Part 381 of this Title.

28 The plaintiffs below urged, and the district court
29 has held, that the recoupment provision of the Regulation
30 contravenes the intention and the language of the AFDC
31 program as stated in the Act, 42 U.S.C. § 601 et seq., and
32

1 the regulations promulgated thereunder, 45 C.F.R. § 203.20(a).
2 The judgment below declared the Regulation to be "null, void
3 and of no effect."

4
5 II

6 Since the purpose of the Act is to encourage "the care
7 of dependant children in their own homes or in the homes of
8 relatives" and "to help maintain and strengthen family life
9 and to help such parents or relatives to attain or retain
10 capability for the maximum self-support and personal independ-
11 ence consistent with the maintenance of continuing parental
12 care and protection," 42 U.S.C. § 601, it is difficult to
13 understand how the Regulation is offensive to the intent or
14 spirit of the Act. It was promulgated to prevent evictions and
15 relocation to other presumably less desirable quarters.
16 Hagans v. Lavine, supra, 462 F.2d at 930. In his dissenting
17 opinion in Hagans v. Lavine, supra, 415 U.S. at 562, Mr.
18 Justice Brennan, joined by the Chief Justice and Mr. Justice
19 Powell, commented: "It would seem extraordinary if, having
20 paid petitioners more than their normal monthly entitlement
21 in order to meet an emergency situation, the State had not
22 sought to recoup the payments over a period of time."

23 The appellees note that 42 U.S.C. § 602(a)(7)¹⁾
24 requires that a State AFDC plan, in determining need, must
25 take into consideration any other income and resources of any
26 child or relative claiming aid, and that § 602(a)(10)²⁾
27 mandates that aid to AFDC families be furnished with reasonable
28 promptness to all eligible individuals. We fail to see how
29 the Regulation is offensive to either provision of the Act.
30 Section 601 sets forth, inter alia, the criteria governing the
31 determination of eligibility. All of the plaintiffs have
32 obviously been found eligible and are receiving benefits. They

1 are not only receiving them promptly, but in advance of the
2 usual payment date.

3 The argument made under subdivision 7 seems to be
4 that in determining need, the State can only consider addition-
5 al sources of income or resources actually available to the
6 recipient and that where there are no such funds during the
7 period of recoupment, there is pro tanto a failure to meet the
8 current needs of the recipient with the aid which subdivision
9 10 mandates shall be furnished promptly to all eligible
10 individuals. But this argument is not persuasive. Here there
11 is no overall reduction of the total amount received by the
12 AFDC beneficiaries, nor is the State calculating an applicant's
13 need based upon questionable presumptions as to available
14 resources. See King v. Smith, *supra*; Lewis v. Martin, 397
15 U.S. 552 (1970); Van Lare v. Hurley, 421 U.S. 319 (1975).
16 There is simply an expedition of payment to accomplish a
17 beneficial purpose perfectly consonant with the philosophy
18 of the Act. A comparable argument was rejected in Cambridge
19 v. Williams, 397 U.S. 471 (1970). The Court there was
20 concerned with a Maryland regulation which imposed an upper
21 limit on AFDC payments of \$250 per family in certain counties
22 and \$240 elsewhere in the State. Plaintiffs there, as here,
23 argued that the State regulation was contrary to 42 U.S.C.
24 § 602(a)(10) in that it denied benefits to dependent eligible
25 younger children of large families. Mr. Justice Stewart's
26 opinion for the Court upholding the regulation noted:

27 The appellees rely most heavily upon the statu-
28 tory requirement that aid "shall be furnished with
29 reasonable promptness to all eligible individuals."

1 42 U.S.C. § 602(a)(10) (1964 ed., Supp. IV). But
2 since the statute leaves the level of benefits within
3 the judgment of the State, this language cannot mean
4 that the "aid" furnished must equal the total of each
5 individual's standard of need in every family group.
6 Indeed the appellees do not deny that a scheme of
7 proportional reductions for all families could be used
8 that would result in no individual's receiving aid
9 equal to his standard of need. As we have noted, the
10 practical effect of the Maryland regulation is that
11 all children, even in very large families, do receive
12 some aid. We find nothing in 42 U.S.C. § 602(a)(10)
13 (1964 ed., Supp. IV) that requires more than this. So
14 long as some aid is provided to all eligible families
15 and all eligible children, the statute itself is not
16 violated.

17 397 U.S. at 480-81 (footnote omitted). In his opinion Mr.
18 Justice Stewart also noted that there was considerable
19 support the legislative history for the State's view that
20 the statutory provision (42 U.S.C. § 602(a)(10)) was designed
21 only to prevent the use of waiting lists. *Id.* at 481 n.12.
22 The same section was construed in *Jefferson v. Hackney*, 406
23 U.S. 535, 546 (1972) where Mr. Justice Rehnquist observed in
24 his opinion for the Court: -

25 That section was enacted at a time when persons whom
26 the State had determined to be eligible for the payment
27 of benefits were placed on waiting lists, because of
28 the shortage of state funds. The statute was intended
29 to prevent the States from denying benefits, even
30 temporarily, to a person who has been found fully
31 qualified for aid. See H.R. Rep. No. 1000, 81st Cong.,
32

1 1st Sess., 48, 148 (1949); 95 Cong. Rec. 13934 (re-
2 marks of Rep. Forand). Section 402(a)(10) also prohibits
3 a State from creating certain exceptions to standards
4 specifically enunciated in the Federal Act. See, e.g.,
5 Townsend v. Swank, 404 U.S. 282 (1971). It does not,
6 however, enact by implication a generalized federal
7 criterion to which States must adhere in their compu-
8 tation of standards of need, income, and benefits. Such
9 an interpretation would be an intrusion into an area
10 in which Congress has given the States broad discretion,
11 and we cannot accept appellants' invitation to change
12 this longstanding statutory scheme simply for policy
13 consideration reasons of which we are not the arbiter.
14 (footnote omitted).

15 We see nothing therefore in the Act which prohibits
16 expressly or by implication the procedure of advances and
17 recoupment provided by the Regulation. On the contrary, as
18 the Supreme Court cases to which we have referred indicate,
19 the State has broad latitude in setting the standard of need
20 and the level of benefit. A fortiori the timing of the pay-
21 ment of that allowance, which is made at the recipient's written
22 request and contains his consent to repayment, should not be
23 beyond the power of the State. There is nothing in the Act to
24 preclude it.³⁾

25 III

26 The appellees also rely on three-judge district court
27 cases in other circuits which have found state recoupment
28 regulations void, either as a deprivation of benefits to an
29 eligible child in violation of § 602(a)(10), or as being
30 contrary to the spirit and intent of the Act. Cooper v.
31 Laupheimer, 316 F. Supp. 264 (E.D. Pa. 1970); Bradford v. Juras,

1 331 F. Supp. 167 (D. Ore. 1971). These cases involved over-
2 payments due to fraud or mistake and subsequent recoupment
3 under the state regulations there involved. We need express
4 no opinion as to the soundness of these opinions but only
5 point out that they are distinguishable from the case at bar.
6 Both cases stressed that the child should not be penalized
7 for the misconduct or mistake of a parent and that the reduction
8 in benefits by recoupment precluded the child from receiving
9 the allowance fixed by the state.⁴⁾ Of course, it does not
10 follow that a child necessarily benefits by an overpayment to
11 a parent, but a child whose parental abode has been preserved
12 by an advance allowance to prevent eviction has undoubtedly
13 been benefitted. Moreover, the payment advanced here was not
14 unintentional; it was a deliberate decision made by the State
15 and the parent to achieve an end perfectly consistent with the
16 intent of the Act.

17 More pointedly, the Regulation in issue here has
18 already been litigated in the courts of New York State with
19 varying results. The Appellate Division, Third Department in
20 Adkin v. Berger, 50 App. Div. 2d 459, 378 N.Y.S. 2d 135 (1976)
21 held that the Regulation was neither mandated by nor in
22 conflict with other federal and state laws and was "an effective
23 means whereby petitioners and others similarly situated can
24 allocate a greater proportion of their public assistance grants
25 to the times when they are in greater need and yet, because
26 of the subsequent recovery of the advances, receive no more
27 than their proportionate share of the limited assistance funds
28 available. As such, the program plainly provides a beneficial
29 service in a reasonable manner, and it should be sustained."
30 378 N.Y.S.2d at 137.

31 Seemingly to the contrary is the memorandum decision
32 of the Appellate Division, Second Department in Dunn v. Bates,

1 50 App. Div. 2d 56, 374 N.Y.S. 2d 677 (1975). That court
2 found the Regulation invalid as written because it failed to
3 limit the recoupment so as to avoid undue hardship. However,
4 a refund was not directed there by reason of the petitioner's
5 failure to exhaust administrative remedies. The Appellate
6 Division, First Department, in a per curiam opinion, Reves v.
7 Dumpson, ___ App. Div. 2d ___, 381 N.Y.S. 2d 58 (1976) found
8 the Regulation invalid and arbitrary because it lacked the
9 protective provisions contained in 19 N.Y.C.R.R. § 352.31(d)
10 (4).⁵⁾ The latter regulation limits recoupment on a case-by-
11 case basis, so as not to cause undue hardship, where there
12 has been a willful withholding of information as to current
13 resources. The court permitted recoupment, however, limited
14 to 15% of the petitioner's current assistance grant, and/
thought Dunn to accord with this result.

15 We are thus confronted with a situation where one
16 department is enforcing the Regulation as written and two are
17 enforcing it subject to the limitations set forth in § 352.31^(d) 6)
18 The latter section has not been cited or argued to us on the
19 argument of this appeal. However, it apparently was the
20 position of the State below that it was applicable and was
21 called to the attention of the court (199 F.Supp. at 425 n.6)
22 which found it irrelevant to the "basic invalidity" of the
23 Regulation. The matter has apparently not yet been litigated
24 in the New York Court of Appeals and, in any event, we would
25 not be bound by a state court's determination that a state
26 regulation was or was not in conflict with the Act. The fact
27 remains, however, that the recoupment procedure for rent
28 advances is being enforced in the state courts subject to the
29 limitations on the rate of recoupment which are not in issue here.

30 It is conceded by the parties here (and indeed there
31 can be no dispute) that the advance allowance procedure
32

1 provided by the Regulation is not mandated by the Act and is
2 in fact a voluntary measure adopted to meet the needs of the
3 recipients. The State does not reimburse any local or county
4 welfare department for the duplication of any grant or
5 allowance for any period. N.Y. Social Services Law § 153(8).
6 Should the Regulation be voided and recoupment be denied, it
7 is not unreasonable to anticipate that the advancement
8 procedure will be discarded. The State made such a representa-
9 tion on the argument of this appeal. Eviction and relocation
10 would then seem to be the only alternative, which would hardly
11 appear to be in the interest of the plaintiff class here.

12 Appellees argue that the Act does provide assistance
13 for emergency needs in the event of a crisis. 42 U.S.C.
14 § 606(e). New York has included the emergency assistance
15 provisions in its plan. N.Y. Social Services Law § 350-j.

16 We note, however, that in interpreting
17 its own law in Baumes v. Davine, *supra*, 38 N.Y.2d 296, 379
18 N.Y.S.2d at 766-67, the Court of Appeals construed it to apply
19 to "sudden and unexplained emergency events" and "not to
20 remedy the anticipated demands created as the result of
21 everyday life." Although failure to pay rent inevitably and
22 naturally leads to eviction, it has been held that advances
23 made to pay regular monthly rent and utility bills are not
24 non-recoverable emergency payments within section 350-j of
25 the Social Services Law, Adkin v. Berger, *supra*. While it is
26 true that a state's definition of an emergency may not be
27 more restrictive than that provided by the Act, Mandley v.
28 Trainor, 523 F.2d 415 (7th Cir. 1975), we do not view the
29 emergency assistance provisions of § 406(e) of the Act as requiring a state
30 participating in the program, to provide delinquent rent for the recipient's
31 present abode in lieu of relocation to some other shelter such as a 'welfare
32 hotel.' Furthermore, the State is not mandated to remain in the emergency
assistance program should it consider the required emergency allotments to
be excessive, and emergency assistance cannot be provided by the terms of

"in excess of 10 days in any 12-month period." 42 U.S.C. § 606

(e)(1). As a result, we cannot escape the possibility that invalidation of § 352.7(g)(7) might leave recipients with no alternatives to eviction.

IV

Appellees further maintain that the Regulation is contrary to 45 C.F.R. § 233.20(a)(12)(i)(A) which provides as follows:

The State may not recoup any overpayment previously made to a recipient:

(1) Unless the recipient has income or resources exclusive of the current assistance payment currently available in the amount by which the agency proposes to reduce payments; except that,

(2) Where such overpayments were occasioned or caused by the recipient's willful withholding of information concerning his income, resources or other circumstances which may affect the amount of payment, the State may recoup prior overpayments from current assistance grants irrespective of current income or resources.

Our previous remand, 527 F.2d at 1153-54, was predicated upon the State having then taken the position that the overpayment regulations were applicable. The State has now argued, however, that no overpayment is involved. We agree. 45 C.F.R. § 205.40(a)(4) defines an overpayment as a financial assistance payment "in excess by at least \$5.00 of the amount that should have been paid, to such assistance unit under permissible State practice" (emphasis added). Since the State Regulation here authorizes the advance allowance, it cannot be properly characterized as an excess over the amount that "should" have been paid. "Overpayment" would seemingly connote a payment which was unintentionally made either through a mistake by the agency or through the mistake or fraud of the recipient.⁷⁾ While the payments made here are in excess of the regular monthly grant, they were of course intentionally advanced at the written request of the recipient.

We conclude therefore that the challenged Regulation is not violative of either the Act or HEW regulations. We think moreover that it represents a sensible response in this State where housing for the indigent presents a continuing and vexing problem. The resources of the State and the Federal government are properly husbanded and utilized to maintain the family unit and to avoid the trauma of eviction and relocation. The possible alternatives, as we have observed, are of doubtful viability and in any event of limited value.

We therefore reverse the judgment below and remand for the convocation of a three-judge court to determine the constitutional issues involved, pursuant to the remand of the Supreme Court.

FOOTNOTES

1) "A State plan for aid and services to needy families with children must . . . (7) . . . provide that the State agency shall, in determining need, take into consideration any other income and resources of any child or relative claiming aid to families with dependent children, or of any other individual (living in the same home as such child and relative) whose needs the State determines should be considered in determining the need of the child or relative claiming such aid, as well as any expenses reasonably attributable to the earning of any such income"

2) "A State plan for aid and services to needy families with children must . . . (10) provide, effective July 1, 1961, that all individuals wishing to make application for aid to families with dependent children shall have opportunity to do so, and that aid to families with

1 dependent children shall . . . be furnished with
2 reasonable promptness to all eligible individuals"

3 3) Appellees rely on King v. Smith, 392 U.S. 309 (1968),
4 which we find to be inapposite. There the Court struck
5 down an Alabama state regulation which denied AFDC
6 benefits to the children of a mother who cohabited with any
7 single or married able-bodied man (the so-called
8 "substitute father" regulation). The Act (42 U.S.C.
9 § 606(a)) defined a dependent child as one whose "parent"
10 was continually absent from the home. The Court held
11 that Congress intended the term "parent" to include only
12 those persons who had a legal duty to support the child.
13 A comparable California regulation which would reduce
14 payments to a child living with his mother and a non-
15 adopting stepfather or a man assuming the role of a spouse,
16 was invalidated on similar reasoning in Lewis v. Martin,
17 397 U.S. 552 (1970). These cases involve state regulations
18 which were in conflict with what the Court construed the
19 Congress to mean when the term "parent" was inserted in
20 the Act. We see no conflict here between the Act and
21 the Regulation. There is no denial or reduction of
22 benefits, but rather an acceleration of payment.
23

24 4) We note that 45 C.F.R. § 232.20(a)(12)(i)(A)(2) (see
25 Part IV of this opinion, infra) permits involuntary
26 recoupment where there has been a willful withholding of
27 information by a recipient resulting in an overpayment
28 even though no additional funds are available. To that
29 extent, of course, the sin of the parent is visited upon
30 the child.
31
32

1 5) "The proportion of the current assistance grant that
2 may be deducted for recoupment purposes shall be limited
3 on a case-by-case basis so as not to cause undue hard-
4 ship, and in no case shall exceed 10 percent of the
5 household needs, and shall continue until such time as
6 the excess payments have been recovered, except that
7 where two or more recoupments are made simultaneously
8 for different reasons or arising from different circum-
9 stances, the total reduction in the assistance grant shall
10 not exceed 15 percent of the household's needs. In the
11 event the amount required to be reduced hereby is greater
12 than the amount of the current grant payments, such pay-
13 ments shall be withheld until the amount of the excess
14 grants has been recouped."

15 6) In Alexander v. Berger (Supreme Court, Suffolk County),
16 175 N.Y.L.J., May 6, 1976, at 11, col. 1, Justice Scilleppi,
17 sitting in the Second Department, enforced the recoupment
18 of a rental allowance despite Dunn v. Bates, supra. He
19 found that in Reyes v. Dumbson, supra, the First Depart-
20 ment had given a rational interpretation to Dunn by per-
21 mitting recoupment subject to the limitations of 18
22 N.Y.C.R.R. § 352.31(d). At the same time, the former
23 Court of Appeals Judge expressed his strong preference for
24 the views of the Third Department in Adkin v. Berger, supra.

25 7) Agency error is not uncommon. See National Welfare Rights
26 Organization v. Weinberger, 377 F. Supp. 861, 865 n.2
27 (D.D.C. 1974), citing a 1973 HEW analysis which established
28 that 45.7% of all errors are made by the agency, and a
29 1972 New York State Department of Social Services Audit
30 Report indicating that 36.9% of all AFDC overpayments
31 were the result of agency error.
32